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# Supreme Court

of the

# United States

OCTOBER TERM, 1979

NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
*Appellants,*

*vs.*

STATE OF FLORIDA,
*Appellee.*

**On Appeal from the Supreme Court of Florida**

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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Noel Chandler and Robert Granger appeal from a final judgment of the Supreme Court of Florida, dated September 27, 1979. (Petition for Rehearing denied on

December 10, 1979). That judgment affirmed a lower court's determination that the presence of television cameras in the courtroom during the defendants' trial pursuant to Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida,[1] did not violate the defendants' rights to a fair trial and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States, respectively. This Jurisdictional Statement is submitted to demonstrate that this Court has jurisdiction of the appeal, and to set forth the substantial federal question presented.

## OPINIONS BELOW

The opinion of the Supreme Court of Florida, a copy of which appears in the Appendix hereto at Pages A 3-4 is published at 376 So.2d 1157 (Fla. 1979). The opinion of the District Court of Appeal of Florida, Third District, reported at 366 So.2d 64 (Fla. 3rd D.C.A. 1979), appears at p. A 7-25.

## JURISDICTION

The judgment of the Supreme Court of Florida, in effect affirming Appellants' convictions[2] arising out of the burglary of a Miami Beach restaurant, was entered on September 27, 1979. See p. A 3-4 *infra*. This

[1]The original provisions of Canon 3A(7), as well as the relevant portions of the Florida Supreme Court opinions amending it for purposes of experimental media coverage (herein referred to as "Experimental Canon 3A(7)") are set forth at p. A 1-2, *infra*.

[2]Appellants were convicted on each of four counts: Conspiracy to Commit a Felony; Burglary; Grand Larceny; and Possession of Burglary Tools.

judgment upheld the constitutionality of Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida, which permitted live television coverage of Appellants' trial over their objections that such coverage was violative of the Sixth and Fourteenth Amendments to the Constitution of the United States. A timely Petition for Rehearing was filed on October 10, 1979 and denied on December 10, 1979. See p. A 5-6 *infra*. The Florida Supreme Court did stay the mandate pending further review in this Court. *Id.* Thereafter, Mr. Justice Powell entered an Order granting a further stay of the proceedings, on Appellants' Motion, on January 11, 1980. See p. A 32-33 *infra*.

A supplementary Notice of Appeal to this Court was duly filed in the Supreme Court of Florida on January 3, 1980. See p. A 26-27 *infra*.

This appeal is being docketed in this Court within ninety days from the date of denial of the Petition for Rehearing below. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida, was promulgated by the Supreme Court of Florida, purportedly pursuant to its general supervisory power under Article V of the Florida Constitution, which authorizes that Court to enact rules of procedure governing the proceedings in all Florida courts.[3] For the purposes of invoking this Court's jurisdiction under 28 U.S.C. §1257(2), the canon is a "statute", the constitutionality of which has been upheld by the highest court in the State of Florida. See,

[3]F.S.A. Const. Art. V, §2 (1972).

*In Re Griffiths,* 413 U.S. 717 (1973); *Mayer v. City of Chicago,* 404 U.S. 189 (1971) (rules of State Courts are "statutes" for purposes of §1257(2)).

## QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

## CONSTITUTIONAL PROVISIONS

*Amendment VI, to the Constitution of the United States, provides in pertinent part:*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

*Amendment XIV, to the Constitution of the United States, provides in pertinent part:*

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

## STATUTE INVOLVED

32 F.S.A. Jud. Conduct Canon 3A(7) (1978 Supp.) was revised by the Florida Supreme Court to permit electronic media coverage of courtroom proceedings. The original Canon 3A(7), in pertinent part, provided:

> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . .

The Canon was revised to permit such coverage on an experimental basis in *Petition of Post-Newsweek Stations, Fla., Inc.*, 327 So.1 (Fla. 1976) *modified* 337 So.2d 804 (Fla. 1976), *modified* 347 So.2d 402 (Fla. 1977), *modified* 347 So.2d 404 (Fla. 1977). See p. A 28-31 *infra*.

Subsequently, Canon 3A(7) was permanently amended to permit electronic media and still photographic coverage of courtroom proceedings, and now provides:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending cause, electronic media and still photography coverage of public, judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.).

## RAISING THE FEDERAL QUESTION

From the very outset of Appellants' trial, the record is replete with numerous challenges made by counsel concerning the presence of television cameras, electronic media, and still photographers. Both oral and written challenges to the coverage were made on constitutional grounds. See p. A 11 *infra.* All such motions were denied by the trial judge, who did, however, certify to the Florida Supreme Court the question of whether the Experimental Canon was mandatory or discretionary. The Supreme Court declined to rule on the trial court's certified question since it was not dispositive of the charges against the defendants, *State of Florida v. Granger,* 352 So.2d 175 (Fla. 1977).

In the District Court of Appeal, Appellants urged error by virtue of the presence of television cameras and still photographers, who recorded portions of the trial while it was actually in progress, both in and out of the presence of the jury. In their brief on appeal, Appellants specifically stated the issue as follows:

> Whether the trial court erred in denying defendants' various motions to declare Experimental Canon 3A(7) unconstitutional in refusing to preclude television cameras from defendants' trial, and in declining to sequester the trial jury, all contrary to defendants' Sixth and Fourteenth Amendment rights to a fair and impartial trial and due process of law.

See p. A 19 *infra.*

The District Court responded directly to Appellants' Assignment of Error on constitutional grounds:

> The first point of the defendants urges error upon the trial court's refusal to preclude television cameras from their trial. Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida, was promulgated by the Florida Supreme Court pursuant to its inherent and constitutional power under Article V of the Florida Constitution. The canon establishes standards and criteria for the use of cameras and electronic recording devices in all of Florida's courtrooms. The court, therefore, must be presumed to have considered that the adoption of the canon preserves the rights of the parties.
>
> In determining that a one year trial program should be instituted, the Florida Supreme Court has determined that camera coverage of a trial does not, in and of itself, violate the federal and state constitutions. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1 (Fla. 1976), 337 So.2d 804 (Fla. 1976), 347 So.2d 402 (Fla. 1977), 347 So.2d 404 (Fla. 1977). We, therefore, decline to discuss further the constitutionality per se of the canon, although we will, in view of the importance of the question involved, certify the decision to the Supreme Court of Florida as a question of great public interest. [footnote omitted].

See p. A 19 *infra.*

In addition, the District Court of Appeal found that Appellants had failed to meet *their* burden of proving that either the presence of cameras in the courtroom or the failure of the trial judge to sequester the jury operated to deprive them of a fair and impartial trial. See p. A 20, *infra.*

On petition for certiorari to the Florida Supreme Court, Appellants renewed their constitutional objections to the admission of the electronic media. Both appellants and respondents argued the point extensively in their briefs on certiorari. Prior to the decision in this case, however, the Florida Supreme Court made the experimental televised trial rule permanent, thus giving the media unlimited live access to Florida's courtrooms while pre-trial motions and trials were in progress. *Petition of Post-Newsweek Stations, Florida,* 370 So.2d 764 (Fla. 1979). Significantly, the *Post-Newsweek* proceedings were never adversarial in nature. No defendant accused of a crime had standing to challenge it *ab initio.*

In the last *Post-Newsweek* case, the Florida Supreme Court expressly dealt with the constitutional issues presented *sub judice. Id.,* at 771-79. There the Court was dealing with *Amicus* briefs in opposition to the Rule, as opposed to the present context convicted Appellants seeking relief in an adversarial setting. Predictably, the Court found no infirmities of constitutional importance to have been generated by its Experimental Canon.

On certiorari to the Florida Supreme Court, Appellants' brief reiterated the constitutional claims by reference to their initial brief before the Court. Nonetheless, the Florida Supreme Court dismissed the Appeal and denied the Petition for Writ of Certiorari, stating:

> . . . We have no appellate jurisdiction, as the district court expressly declined to rule upon the constitutional issue *Chandler v. State,* 366 So.2d 64, 69 (Fla. 3rd D.C.A. 1978).[4]
>
> Nor do we have certiorari jurisdiction. No conflict has been demonstrated, and the question of great public interest certified to us by the district court has been rendered moot by the decision in *Petition of Post-Newsweek Stations, Florida, Inc.,* No. 46, 835 (Fla. Apr. 12, 1979). [370 So.2d 641 (Fla. 1979)].

See p. A 3-4 *infra.*

The Florida Supreme Court thus considered and expressly rejected renewed argument of the constitutional question before it, contending that its earlier pronouncement on the constitutional propriety of electronic media coverage of criminal trials rendered Appellants' arguments moot. The Federal question has therefore been seriously, conscientiously and continuously pursued below.

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[4]In fact, the District Court of Appeal did rule on the constitutional issue referring to the *Post-Newsweek* decisions and authority to "decline to discuss *further* the constitutionality per se of the Canon." See p. A 19 *supra.* [Emphasis added.]

## STATEMENT OF THE CASE

Appellants, NOEL CHANDLER and ROBERT GRANGER, were charged in a four-count information which arose out of the burglary of a popular Miami Beach restaurant (Picciolo's) on May 23, 1977. While all the details of the incident are not relevant to the issue currently before the Court, several aspects of the case separate it from the ordinary burglary. Both Appellants were, at the time of the burglary, City of Miami Beach police officers. In addition, certain evidence central to the State's case against Appellants was obtained in a most unusual manner — a local "ham" radio operator had intercepted oral conversations which were purportedly made between Appellants over their "walkie-talkie" radios during the burglary at 2:50 a.m. This amateur radio enthusiast tape-recorded those intercepted communications. The recording was eventually turned over to the Miami Beach Police Department and used as evidence against Appellants at trial.

The charges, therefore, presented unique and newsworthy details not ordinarily associated with "run of the mill" criminal cases. This case contained at least two elements capable of generating abnormal public interest above and beyond that usually associated with a burglary: a potential betrayal of the public trust by "good 'cops' gone bad"; and a "one-in-a-million" fluke interception and recording, by an insomniac ham radio operator, of a conversation broadcast on a little-used frequency in the "dead" of the South Florida night. As might be expected in light of the above, Appellants' case received extensive and repeated pre-trial, as well as trial, attention in the local media.

Against this background of widespread publicity, Appellants endeavored to minimize the potential for jury and witness prejudice by moving for exclusion of the electronic media at the earliest opportunity.[5] At the hearing on Appellants' Motion to Suppress, the Trial Court denied one of several motions to bar television cameras and still photographers which were made throughout the pre-trial and trial proceedings. Still photographers and television cameras were permitted to record the proceedings "live and in person", and in the presence of the jury, pursuant to Experimental Canon 3A(7).

At trial, counsel for Appellants renewed the challenges to Experimental Canon 3A(7) as violative of the Sixth and Fourteenth Amendments to the United States Constitution. Again, the objection to media presence was denied and the trial proceeded under the watchful lens of Miami's electronic press. Appellants were eventually convicted of all the charges against them, and sentenced to a total of seven years' imprisonment, to be followed by nine years' probation.

In the Florida District Court of Appeal, Appellants assigned as errors the refusal of the Trial Court to exclude the electronic media from the courtroom at Appellants' repeated urging. The Court of Appeal, in its analysis of these constitutional claims, chose to defer to the opinion of the Florida Supreme Court, in which that

[5]Defense counsel's repeated objections during pre-trial proceedings resulted in the trial court's certification of the question concerning the mandatory nature of the Experimental Canon. As stated above, the Supreme Court declined to rule on the question. *State of Florida v. Granger*, 352 So.2d 175 (Fla. 1977).

Court instituted the experimental program. The intermediate appellate court assumed that that decision represented a conclusion by the Florida Supreme Court that the Televised Trial Rule was not unconstitutional *per se* and thus was dispositive of this issue. Nevertheless, the Court certified the question to the Florida Supreme Court as "one of great public interest". In addition, the Court determined that Appellants had the burden of showing actual prejudice caused by the presence of electronic media in order to establish a denial of Federal constitutional rights by reason of the operation of Experimental Canon 3A(7). Having failed to carry their "burden", the Court concluded that Appellants failed to establish either a deprivation of their rights to a fair and impartial trial or a denial of their rights to due process of law under either the Sixth or Fourteenth Amendments to the United States Constitution.

Appellants again renewed their constitutional claims at length before the Florida Supreme Court on Petition for Certiorari and Appeal. Despite certification of the question by the District Court of Appeal, and extensive briefing of the point by both Appellants and Appellee, the Florida Supreme Court summarily dismissed the issue as having been rendered moot by the intervening decision of the Court in *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979), to make the Experimental Canon permanent. The Petition for Writ of Certiorari was therefore denied on the basis of the constitutional discussion contained in the *Post-Newsweek* decision. See 370 So.2d at 770-79, and the appeal dismissed as discussed earlier.

## THE QUESTION IS SUBSTANTIAL

The Supreme Court of Florida permits television, radio, electronic media and still photographic coverage of literally all that occurs in State trial and appellate courtrooms.[6] Instituted initially on an experimental basis, coverage is now permanent and mandatory in civil and criminal matters, at pre-trial, trial and appellate stages. As a result, judicial proceedings in Florida have been elevated to a new standard of public access. Trials are not only open to the populace, they are, in fact, delivered in carefully selected instances and highly-edited forms, to the living rooms and bedrooms of Florida's residents. So enthusiastically has the Florida Supreme Court embraced the concept of video justice that it has enhanced the procedural rules in such a manner so as to guarantee that the "artistic" efforts of media are unimpeded by any objections raised by the trial participants. No defendant, witness, or juror in a criminal matter, nor any litigant or participant in any civil, divorce, equity or probate proceedings, may preclude media coverage of his or her trial or participation therein.

Florida has instituted media coverage in an ostensible effort to "enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." *Post-Newsweek, supra,* 370 So.2d 780. In the interest of the hypothetical benefits flowing from this novel fascination with public relations, however,

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[6]As of January 22, 1980, according to the National Center of State Courts, Research and Information Service, 23 states allow television coverage in the courtroom on either a limited, experimental, or permanent basis. See also, footnote 7.

the Florida Supreme Court has cavalierly flirted with the possibility of irreparable damage to the most fundamental underpinnings of our criminal justice system — the accused's rights to a fair trial and to due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. To date, dozens, possibly hundreds, and maybe thousands of defendants in Florida courts, including Appellants, have been, or are being subject to in-progress media coverage of their trials. Many thousands more face a similar prospect in the future, both in Florida and elsewhere as half of the State thus far have rushed to duplicate the Florida script for the promotion of open government and the achievement of enhanced ratings for television news programs.[7]

This case presents the Court with a clear opportunity to determine whether the proliferation of cameras in the courtrooms, over the objections of a defendant, is consistent with the protections insured by the Constitution of the United States. The rule promulgated by the Florida Supreme Court has encouraged other states whose courts have long felt constrained by Constitutional mandate from allowing electronic media coverage of criminal trials in progress. While the Constitutional debate on this subject has been lengthy and heated, absent a final decision by this Court, the momentum of the Florida Rule will continue

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[7]See footnote 6; the States which do permit coverage in one form or another are: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Iowa, Louisiana, Minnesota, Montana, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, West Virginia and Wisconsin. (New York and New Mexico have had one-day experiments only).

to spread camera coverage of criminal trials to other states without serious investigation of the potential danger being inflicted upon the integrity of the criminal justice system nationwide. It is therefore urgent that this Court render its decision to prevent Florida and other individual states from continuing this constitutionally blind rush to electronic justice.

## ELECTRONIC MEDIA COVERAGE OF A TRIAL OVER THE ACCUSED'S OBJECTION VIOLATES THE DEFENDANT'S RIGHTS TO A FAIR AND IMPARTIAL TRIAL AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### 1. The presence of electronic media in the courtroom over the defendant's objection is wholly inconsistent with prior constitutional pronouncements of this Court.

At the very center of the constitutional inquiry into the propriety of electronic media access to the courtroom is recognition of the purpose of a trial. This Court has previously determined that a defendant was deprived of his constitutional rights to due process of law and a fair and impartial trial when portions of his trial and certain pre-trial proceedings were televised and broadcast over his objection. *Estes v. State of Texas*, 381 U.S. 532 (1965). At that time, the Court emphatically rejected the notion that broadcast coverage of a defendant's trial in progress or pre-trial matters was consistent with the fundamental purpose of a trial:

> Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries, Anglo American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time these safeguards do not permit the televising and photographing of a criminal trial, save in two states and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial — the most fundamental of all freedoms — must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time to time have proven efficacious and necessary to a fair trial.

*Id.*, 381 U.S. 540-41. That Experimental (now permanent) Canon 3A(7), Code of Judicial Conduct of the State of Florida, exists at all is prime evidence that the Supreme Court of Florida has improperly disregarded the constitutional infirmities which mandated reversal of *Estes'* conviction almost fifteen

years ago.[8] That the number of states now permitting televised trials has grown so dramatically despite so lucid a pronouncement by this Court in *Estes* is, in itself, evidence of the absolute necessity for review of the Florida Canon at this time.

The concerns voiced by the *Estes* Court remain proper objects of apprehension today. The spectre of undesirable psychological effects on jurors and witnesses has increased as a result of the pervasive persuasiveness of the electronic media. Mr. Justice Clark's concern with the additional political pressures on the trial judge is still more frightening today in view of the examples of

[8]Significantly, the decisions authorizing the Experimental Canon in effect at the time of appellants' trial made no mention whatsoever of the *Estes* decision. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.1 (Fla. 1976), *modified* 337 So.2d 804 (Fla. 1976), *modified* 347 So.2d 402 (Fla. 1977), *modified* 347 So.2d 404 (Fla. 1977).

extreme media abuses demonstrated in this country,[9] and around the world, where televised tribunals affect justice aimed at inflaming the masses, politicizing an issue, or otherwise abusing the very purpose of a "trial" in the traditional sense. Neither have the problems of media abuse nor the need for lucrative sponsorship been resolved to assure that televised trials will not be another electronic narcotic serving the public's addiction to the sensational. In short, the reasoning of this Court in *Estes* has survived the test of time, and the essential conclusions rendered therein remain logically imperative:

> As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said

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[9]As representative of the fears expressed during the experimental year, Judge Norman C. Roettger, evaluating a challenge to the Florida Canon filed in U.S. District Court for the Southern District of Florida, made the following statement:

> And I might say that I find the order of the Supreme Court of Florida distressing. [Experimental authorization] Not one word in that opinion, in that order concerning the rights of the litigants. I find it particularly distressing where it says 'request from the news media,' and where in this state, as is obvious in the past few years, Supreme Court Justices can be made or broken as far as their election chances by the news media.

Memorandum Opinion from the bench in *Briklod v. Rivkind,* Case No. 77-2148 (U.S.D.C. So.Dist.Fla. 1977) at 5-6. Despite his stated opposition to the experimental rule, Judge Roettger was unable to find the rule "flagrantly and patently violative of express constitutional prohibitions in *every* clause, sentence and paragraph." *Id.*, applying the standards set forth in *Judice v. Vail,* 430 U.S. 327 (1977).

> to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into the court proceedings.

381 U.S. at 544, 85 S.Ct. at 1634.

The constitutional mandate expressed in *Estes* was deftly sidestepped by the Florida Supreme Court in its enactment of Experimental (now permanent) Canon 3A(7), largely based on the 4-1-4 division of the *Estes* Court. Relying substantially on Mr. Justice Harlan's "swing" vote in the plurality, *Petition of Post-Newsweek Stations, Florida, Inc., supra,* 370 So.2d at 773, the Florida Supreme Court took license to disregard the clear constitutional reasoning underlying the decision. In fact, Mr. Justice Harlan himself recognized the difficulties inherent in his choice of a narrow constitutional adjudication, acknowledging that the constitutional issue in the future might not survive the limiting of his concurrence to the specific facts of *Estes:*

> . . . I wish to make perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn on the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportion.

381 U.S. at 590, 85 S.Ct. at 1663. To argue that *Estes* is constitutionally impotent, and thus may be ignored by

the states in their rush to permit media coverage of criminal trials is to plunge the literal language of this cautious constitutional jurist far below the obvious depth of his analysis. Florida Canon 3A(7) is thus inconsistent with the governing constitutional pronouncement of this Court in *Estes,* and televised trials must remain among that class of procedures involving "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.*, at 381 U.S. 543-44, 85 S.Ct. at 1633.

Moreover, recent and pending constitutional evaluations of the role of the media in the courtroom lend further support to the need for immediate review of this case by this Court. The constant concern over the dangers of a publicity-polluted trial to a defendant's Sixth and Fourteenth Amendment rights led to this Court's significant ruling in *Gannett Co. v. DePasquale,* 99 S.Ct. 2898 (1979). The interests protected by the closure order in *Gannett* are the sort threatened by televised trials, and the potential for injury of constitutional magnitude is multiplied many times by the pervasive presence of electronic media coverage. In Florida, under Canon 3A(7) and even after *Gannett,* pre-trial publicity has not been minimized, rather it has been expanded, frequently in "living color". The concerns for protective measures so central to the *Gannett* decision are especially pressing where, as in Appellants' case, even a pre-trial motion to suppress (heard a few scant weeks before trial) is *subject* to televised coverage over their objections (although this did not actually occur). That such an occurrence remains capable of repetition despite the *Gannett* decision further underscores the need for review by this Court of the Florida Supreme Court's actions.

Notation of probable jurisdiction by this Court will, in addition, provide the opportunity to fully explore and authoritatively define the issues currently under the Court's review in *Richmond Newspapers, Inc. v. Virginia,* ____ U.S. ____ (Case No. 79-243) (Pending). The *Richmond* case, dealing with the question of the constitutional limits of media access to judicial proceedings, is the other side of the question presented here: When does the possibility of potential prejudice mandate that media activities be limited to protect the Constitutional rights of the accused?

The question of media access is clearly married to the evaluation of the results of coverage once access is granted. Resolution of this case will therefore provide this Court with an opportunity to define the permissible scope of media access to criminal pre-trial and trial proceedings where the accused objects to live television, electronic and/or still photographic coverage.

**2. The circumstances surrounding the implementation of Experimental (now permanent) Canon 3A(7) demonstrate that the constitutional ramifications of televised criminal trials have not been properly considered by the Florida Supreme Court.**

The Florida Supreme Court's decision in *Petition of Post-Newsweek Stations, Fla., Inc.,* 370 So.2d 764 (Fla. 1979), upon which that Court relied in denying Appellants' petition below, itself details the myriad of difficulties encountered in the attempt to institute televised coverage of Florida's judicial proceedings.

These problems underscore the high degree of resistance to the Court's Rule.[10] Even more significant is the realization that the entire project was instituted at the behest of the media itself. This belies any claim of broad legal support for the alteration of the Canon and raises the spectre of both commercial self-interest and the utilization of, at least, undue and subtle pressure by media on the elected Florida Supreme Court Justices.

By its own account, the Florida Supreme Court was forced, from the very outset, to continuously enlarge the scope of the experiment in an effort to obtain "volunteer" participation by wary litigants and participants during the early stages of the Experimental Canon, *Post-Newsweek Stations, Florida, Inc.*, 370 So.2d at 766. The Court's original Order authorizing televised trials was amended no fewer than five times in an effort to solicit "voluntary" participation which was ultimately conscripted for a period of one year when it became painfully apparent that trial judges, lawyers, jurors, witnesses and litigants wanted nothing to do with *Post-Newsweek's* intimidating experiment in living judicature. Even the Florida Supreme Court noted that *"The overwhelming majority* of the trial judges of this state, while generally unsympathetic to the experiment, made a good faith effort to comply . . ." *Id.*, at 767. [Emphasis added.]

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[10]The list of organized Bar and professional groups which opposed the experimental rule is prestigious indeed: The Florida Bar, the Conference of Circuit Judges, the Trial Lawyers Section of the Florida Bar, Chairman of the Florida Judicial Qualifications Commission, and others. See *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1 (1976).

After the one-year period ended, in an effort to lift the experiment up by its own bootstraps, the Florida Supreme Court attempted for the first time to evaluate the effect of the "cameras in the courtroom" project on witnesses, jurors, attorneys, judges and litigants. Those attempts at controlled and empirical study of the results went totally astray. Ultimately, the sole "objective" study conducted by the Court, through the Judicial Planning Coordination Unit of the Office of State Courts Administration (OSCA), was a subjective questionnaire distributed to some of the participants in televised trials.

Though outwardly cautious about the significance of such unscientific a study, the Court used its interpretation of the results as the hub for its conclusion that television coverage should be permitted because it did not infect the trial proceedings. *Id.*, at 766-69, 781. In fact, even this survey, when read objectively, reveals that the Court used general terms to gloss over the fact that a Constitutionally significant number of persons who responded to the questionnaire were in some way affected, influenced by, or aware of, the camera's presence during the trial. Worse still, an independent analysis of the method used in, and details of, the questionnaire commissioned by Appellants' attorney, revealed *serious* defects that rendered the entire questionnaire meaningless. Moreover, extensive proffers of previous empirical studies tending to confirm the dangers foreseen by this Court in *Estes* were ignored by the Florida Supreme Court in its opinion.[11]

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[11]Among the authorities referred to the Florida Supreme Court by Appellants' counsel in his capacity as *amicus curiae* in opposition to the *Post-Newsweek* Petition were:

Asch, Solomon E., "Studies of Independence and Conformity; A Minority of One Against a Unanimous Majority", *Psychological Monographs:* General and Applied, Vol. 70, No. 9

Deutsch, Morton and Harold Gerard, "A Study of Normative and Informational Social Influences Upon Individual Judgment", *Journal of Abnormal and Social Psychology,* Vol. 51 (1955)

Gerbner, George and Larry Gross, "Living With Television: The Violence Profile", *Journal of Communication*

Gerbner, George, et al., "Cultural Indicators: Violence Profile No. 9", *Journal of Communication,* (Summer, 1978)

Lezuk, Muriel D., "Some Psychological Limitations on Witness Reliability", 20 *Wayne L. Rev.* 117 (1973)

McClure, Robert D. and Thomas F. Patterson, "Print v. Network News", *Journal of Communication,* Vol. 26, No. 2 (Spring, 1976)

Morton, Jane S., Robert R. Blake and Joseph A. Olmstead, "The Relationship Between Frequency of Yielding and Disclosure of Personal Identity", *Journal of Personality,* Vol. 24 (1956)

Padawer-Singer, Alice, et al, "Voir Dire by Two Lawyers: An Essential Safeguard", *Judicature,* Vol. 57, No. 9 (April 1974)

Raven, Bertram H., "Social Influence on Opinions and the Communication of Related Content", *Journal of Abnormal Psychology,* Vol. 58 (1959)

No reference to these or other empirical studies tending to contradict the Florida Supreme Court's "impression" of no prejudicial effect of the media was made in any *Post-Newsweek* opinion.

Thus, the sum of the Florida Supreme Court's efforts are fairly characterized as having foisted an experimental program on an unremitting and unyielding legal community at the behest of a commercial entity, without having properly "tested the water" to ascertain the implications and effect upon the defendants' Sixth and Fourteenth Amendment rights. Despite this lack of safeguards, as documented by surveys of questionable value themselves contradicted by empirical evidence, the Florida Supreme Court made the Experimental Canon permanent, ostensibly to assure the continued desirability of open judicial proceedings. *Post-Newsweek, supra,* 370 So.2d at 781.

This is not to suggest a lack of sincerity on the part of the Florida Supreme Court concerning the alteration of the Canon. However, for the purposes of this Court's notation of probable jurisdiction on the Constitutional issue, it is vital that the Court be aware of the manner in which the Florida Supreme Court authorized a procedure which this Court has already determined to be violative of the constitutional rights of a defendant in a criminal case. Given the unique circumstances presented by a concurrence of political realities of elective judgeships and of change instituted at the urging of the media which so vitally acts on those realities,[12] the Florida Supreme Court's determination that Experimental (now permanent) Canon 3A(7) is constitutionally proper must be reviewed by this Court, as the final arbiter of all serious constitutional questions.

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[12]See footnote 9, *supra.*

### 3. A showing of specific prejudice is not necessary for review by this Court.

Finally, with regard to establishment of specific, articulable prejudice to Appellants' rights caused by the television and still photographic coverage of portions of Appellants' trial, this Court has already rejected the need for such a showing in *Estes.* Although the State of Florida predictably argued to the contrary below, Mr. Justice Clark's analysis of prior caselaw conclusively adopts a due process approach which dispenses with the necessity for a showing of prejudice. *Estes, supra,* 381 U.S. at 542-44, 85 S.Ct. at 1132-4. (See, also, *In Re Murchison,* 349 U.S. 133 (1955) and *Tumey v. State of Ohio,* 273 U.S. 510 (1927).) Mr. Justice Harlan, notably, concurred fully in that determination when he stated, in *Estes, supra,* 381 U.S. at 593:

> I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without *any positive showing of isolatable prejudices.* [Emphasis added.]

Mr. Justice Harlan's conclusion, therefore, is clearly consistent with this Court's holding in *Chapman v. State of California,* 386 U.S. 125 (1967), that the beneficiary of the claimed violation of a constitutional right (here the Appellee) bears the burden of showing non-prejudice. The doctrine of harmless error, therefore,

does not apply, even *if* this were a close case involving overwhelming evidence establishing the Appellants' guilt. Thus, even though Appellants' arrest, pre-trial and trial proceedings were the subject of substantial media coverage, and, as described earlier, presented the type of unique factors which would see it fairly classified as "notorious", a specific showing of prejudice in this case is unnecessary to the court's notation of probable jurisdiction.

## CONCLUSION

The Florida Supreme Court, through its institution of Experimental (now permanent) Canon 3A(7), has forced upon a reluctant legal community a Rule of Court which has previously been deemed constitutionally infirm by this Court. Worse still, the circumstances surrounding the implementation of the televised criminal trial rule, render the Florida decision suspect in its constitutional analysis of its own actions. The determination of the Constitutionality of televised pre-trial and trial proceedings over a defendant's objection ought to be reviewed by this Court to guarantee that the rights of the accused in Florida, and throughout the nation, continue to be observed. Absent such review, the deprivation of Constitutional rights presently occurring in Florida will become a hallmark of trial procedure throughout the nation. For all the reasons expressed above, Appellants respectfully suggest that this Court note probable jurisdiction of this appeal, and reverse the convictions below.

Respectfully submitted,

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Date: February 14, 1980

# APPENDIX

## APPENDIX

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Canon 3A(7) of the Florida Code of Judicial Conduct provided, in relevant part:

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction.

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

32 F.S.A. Jud. Conduct Canon 3A(7) (1978 Supp).

Canon 3A(7), as amended, now provides:

(7) Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

Amended April 12, 1979, effective May 1, 1979 (370 So.2d 764).

32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.)

Noel CHANDLER et al.,
*Petitioners/Appellants,*

*v.*

STATE of Florida,
*Respondent/Appellee.*

Nos. 56040, 56194 and 56236.

Supreme Court of Florida.

Sept. 27, 1979.

Rehearing Denied Dec. 10, 1979.

Writs of Certiorari and Appeal from District Court of Appeal, Third District.

Joel Hirschhorn of Hirschhorn & Freeman, and Richard M. Gale, Miami, for petitioners/appellants.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, for respondent/appellee.

PER CURIAM.

This cause reaches us by way of petitioners' assertion of appellate jurisdiction and petition for writ of certiorari from a decision of the District Court of Appeal, Third District, reported at 366 So.2d 64. We have no appellate jurisdiction, as the district court expressly declined to rule upon the constitutional issue. *Chandler v. State,* 366 So.2d 64, 69 (Fla.3d DCA 1978).

Nor do we have certiorari jurisdiction. No conflict has been demonstrated, and the question of great public interest certified to us by the district court has been rendered moot by the decision in *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979).

Accordingly, the petition for writ of certiorari is denied.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

SUPREME COURT OF FLORIDA
MONDAY, DECEMBER 10, 1979

CASE NOS. 56,040
56,194
56,236

District Court of Appeal,
Third District of Florida
77-2624

NOEL CHANDLER, et al.,
*Petitioners/Appellants,*

*v.*

STATE OF FLORIDA,
*Respondent/Appellee.*

Upon consideration of the Petition for Rehearing filed by attorneys for Petitioners/Appellants,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied.

Motion for Stay filed by attorneys for Petitioners/Appellants is hereby granted and proceedings in this Court; in the District Court of Appeal, Third District of Florida; and in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida are hereby stayed to and including January 9, 1980, to allow Petitioners/Appellants to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: [Illegible]
[Illegible]

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Alan R. Schwartz, Judge
Hon. Richard P. Brinker, Clerk

Joel Hirschhorn, Esquire
Richard M. Gale, Esquire
Hon. Jim Smith-Miami
Steel, Hector & Davis

Noel CHANDLER and Robert Granger,
*Appellants,*

*v.*

The STATE of Florida,
*Appellee.*

No. 77-2624.

District Court of Appeal of Florida,
Third District.

Dec. 19, 1978.

Rehearing Denied Jan. 17, 1979.

Defendants were convicted in the Circuit Court, Dade County, Alan R. Schwartz.

CHANDLER v. STATE
Cite as Fla.App., 366 So.2d 64

J., of conspiracy to commit a felony, burglary, grand larceny, and possession of burglary tools and they appealed. The District Court of Appeal held that: (1) admission of television cameras into courtroom did not deprive defendants of a fair trial; (2) taperecorded conversation between defendants was admissible as defendants were not entitled to any reasonable expectation that their conversation would remain private; (3) trial court's failure to admit condensed version of tape recordings was not reversible error, and (4) evidence was sufficient to support convictions.

Affirmed.

1. Constitutional Law — 268(2)
   Criminal Law — 633(1)

Admission of television cameras pursuant to experimental canon into trial of two police officers arising out of burglary of restaurant did not deprive defendants of fair trial, due process, or an impartial jury. 32 West's F.S.A. Code of Judicial Conduct, Canon 3, subd. A(7); U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law — 394.3

Private citizen's tape recording of oral "walkie-talkie" conversation between defendants was not an interception of a communication transmitted by wire or cable furnished or operated by a common carrier within meaning of statute prohibiting such an interception so as to require suppression of tape recording in prosecution growing out of burglary; defendants, who were two police officers, did not have any reasonable expectation that their conversation would remain private. West's F.S.A. §934.02(1).

3. Criminal Law — 1170(1)

Trial courts enjoy a certain discretion in ruling on admissibility of evidence and simply because the defendant thinks that tendered evidence might be beneficial does not make its rejection reversible error.

4. Criminal Law — 338(1)

Where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission.

5. Criminal Law — 1170(1)

Where defendants failed to present any reasonable theory upon which admission of condensed version of tape recording, which was originally made by private citizen, which was introduced in burglary prosecution and which tended to connect defendants with offense, would have helped prove their alibi defense, trial court's failure to admit condensed version of tape recording was not reversible error.

6. Burglary — 41(1, 9)
Conspiracy — 47(3)
Larceny — 65

Evidence, which included taped conversation between defendants tying them firmly to burglary of restaurant and testimony which placed defendants at scene of crime, was sufficient to support defendant police officers' convictions for conspiracy to commit a felony, burglary, grand larceny, and possession of burglary tools.

7. Criminal Law — 662(1)

In prosecution arising out of burglary of restaurant, defendants were allowed sufficient latitude in presenting their theory that one of State's witnesses was hostile to them; trial court's ruling limiting cross-examination of witness with regard to a complaint made by a defendant and another police officer against him

was within its discretion; thus, defendants' rights to confrontation of witnesses was not abridged. U.S.C.A.Const. Amends., 6, 14; West's F.S.A. Const. art. 1, §16.

8. Witnesses — 370(1)

It is competent to show as a fact that a witness is hostile to party against whom he testifies, and jury can consider this hostility in estimating his testimony; but an inquiry into conduct of actual parties producing hostility raises another and collateral issue, which should not be permitted to be gone into by trial judge, otherwise there would be no limit to investigation of any cause.

9. Criminal Law — 986

Defendants, who were convicted of burglary and related offenses, voluntarily waived right to presentence investigation and could not complain on appeal that absence of such investigation was error. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.710.

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Hirschhorn & Freeman and Joel Hirschhorn, Miami, for appellants.

Robert L. Shevin, Atty. Gen., and William M. Grodnick, Asst. Atty. Gen., for appellee.

Steel, Hector & Davis and Talbot D'Alemberte and Donald M. Middlebrooks, Miami, For Post-Newsweek Stations of Florida, Inc. as amicus curiae.

Before HAVERFIELD, C.J., and PEARSON and KEHOE, JJ.

PER CURIAM.

Appellants Noel Chandler and Robert Granger were the defendants to a four count information[1] growing out of the burglary of Picciolo's Restaurant, Miami Beach, Florida, on May 23, 1977. At the time of the filing of the information on July 1, 1977, the two defendants were police officers with the City of Miami Beach Police Department.

During the trial, the defendants filed various motions and challenges to Florida's Experimental Canon 3 A(7). Pursuant to this canon, cameras were permitted to televise portions of the defendants' trial. The challenges were overruled and requests to exclude live television coverage were denied. In addition, the defendants' request to sequester the jury was also denied.

The trial in this case began on December 5, 1977. During the trial, evidence was presented to the effect that a few days prior to the burglary in question, defendant Chandler was one of several Miami Beach police officers who investigated another burglary at Picciolo's Restaurant.

On Sunday, May 22, 1977, Picciolo's Restaurant closed at 12:30 a.m., early on the morning of May 23,

[1]Count I — Conspiracy to Commit a Felony (a misdemeanor)
Count II — Burglary (a felony)
Count III — Grand Larceny (a felony)
Count IV — Possession of Burglary Tools (a felony)

1977. Upon reopening the restaurant at 8:00 a.m. on the morning of May 23rd, one of the cooks noticed that the floor safe, which had contained the previous day's receipts, had been "drilled" and was empty. Also, a door leading outside was open.

During the trial, defense counsel sought a Writ of Body Attachment against Don Froschneider, who had been subpoenaed as a defense witness and whose testimony was said to be essential, inasmuch as he had brought a condensed cassette tape to the Miami Beach Police Department. This tape had been made by John Sion. The court stated that the condensed tape was not material except insofar as it might shed some light on when the original tape was made. Defense counsel argued that this was the reason, in fact, that he was seeking Froschneider's testimony. Defendants here argue that this fact is especially important in light of their affirmative defense of alibi for the night in question.

The recording originally made by John Sion has an extremely interesting origin. During May, 1977, Sion, who lived with his mother in an apartment near Picciolo's Restaurant, was awakened one morning (on an undetermined date) at 2:50 a.m., at which time he switched on his ham radio receiver and began reading a book. Upon hearing a conversation over the radio about "registers," he thought that the conversation might concern a robbery and, therefore, he began taping the conversation. Sion was unable to give the exact date of the making of the tape, although he testified that he had discussed the matter with Froschneider on May 26,

1977.[2] During their first conversation about the tape recording. Sion gave Froschneider the frequency numbers on which the conversation had been overheard and Froschneider wrote the numbers on a piece of paper. Froschneider contacted Sion about hearing the tape and Sion played the tape for him, but Froschneider had trouble understanding it.[3] Therefore, Sion made a condensed version of the original tape, omitting the numerous pauses.

Miami Beach Police Office Charles Hayes testified that he had observed defendant Granger at about 3:00 a.m. on the morning of May 23, 1977, driving a marked Miami Beach Police vehicle. He testifed that he observed Granger, who was in uniform, four or five times that morning within a two block radius of Picciolo's Restaurant. During the direct examination of Hayes, the jury was excused for the purpose of inquiring into the admissibility into evidence of Sion's original tape. The tape was played in its entirety. Hayes stated that he had previously heard the condensed version of the tape. Defense counsel objected to the admission of the original tape, arguing that there was no evidence linking it to the allegations contained in the information and that no testimony existed that the tape was made on May 23, 1977. The objection was overruled by the court and the

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[2]In an earlier sworn statement. Sion had testified that he told Chief Investigator Martin Dardis of the state attorney's office that he had taped the conversation during the Memorial Day weekend.

[3]Prior to trial, the defendants filed a motion seeking to suppress the tape recording because no intercept order had been obtained and because of defendants had a reasonable expectation of privacy in their walkie-talkie conversations. The motion was denied.

tape was admitted into evidence. Upon the jury's return to the courtroom, the original tape was again played in its entirety for the jury. Hayes identified the voices on the tape as those of the two defendants. The tape contained numerous statements purporting to link the defendants to the burglary. On cross-examination, Hayes admitted remembering something about a complaint once made by Chandler and an Officer Wilson against him (Hayes) to the police supervisor. Upon objection by the prosecutor, the court limited any further inquiry into Chandler's complaint against Hayes.

On June 17, 1977, state attorney office investigator William Riley secured the original tape from Sion. Both Sion and Riley initialed the tape and dated it. On July 12, 1977, Riley obtained the inner-mechanisms of several locks from Picciolo's Restaurant, including the lock from the door which had been discovered open. The locks were submitted to the Public Safety Department Crime Lab for analysis and it was determined that there were scratches in the lock that had come from the exterior side of the opened door and which were relatively fresh. A locksmith, Earl Hall, concluded that as the marks had been made on the pins of the lock, the lock had been "picked."

Police testimony revealed that Granger and Chandler did not work the shift from 11:00 p.m. on May 22, 1977, to 9:00 a.m. the following morning. Further testimony revealed that in May and June of 1977, because of the large number of police vehicles owned by the Department, some of the unused vehicles were kept on the street behind the station.

The chief maintenance engineer at LaGorce Country Club testified that in January of 1977, defendant Chandler had approached him with regard to radio equipment and that Chandler had shown him two walkie-talkies on June 3, 1977.

Upon the prosecution's resting its case, defense counsel moved for a judgment of acquittal on the basis of insufficient evidence and the lack of a prima facie case. Defense counsel further argued that the case of the prosecution consisted solely of inferences piled upon inferences. The court denied the motion and the defense proceeded with its testimony and evidence.

Donald Froschneider testified about his conversation with Sion concerning the tape recording and, although not recalling the exact date of the conversation, placed it at about Memorial Day (May 29) of 1977. He testified that he had listened to the condensed version of the tape at a subsequent time and that Sion had written down the frequency numbers on a piece of paper. He stated that he had brought the numbers to Lieutenant Webb of the Miami Beach Police Department, as well as the condensed version of the tape. Lieutenant Webb testified that he received the tape from Froschneider at the end of May, 1977, and that he immediately turned over the tape to Sergeant Morgan. Sergeant Morgan testified to receiving the tape from Lieutenant Webb on June 3, 1977, and that a piece of paper with numbers accompanied the tape, but he could not explain what happened to the piece of paper.

Sergeant Monteagudo of the Miami Beach Police Department testified that he received the condensed tape from Morgan on June 7, 1977, that he initialed it,

which was standard police procedure, that he wrote the words "B and E, Granger and Chandler" on the tape but that later he obliterated the writing and subsequently turned the tape over to Martin Dardis of the state attorney's office.

Defendants moved that the condensed tape be admitted into evidence but the prosecutor's objection to that motion was sustained, and the defendants, therefore, renewed the motion, which was denied, at the conclusion of all the testimony.

Defendants sought to call Miami Beach Police Officer Robert Wilson, but the prosecution objected to any testimony by Wilson concerning a complaint by Wilson and Chandler against Hayes. Defendants submitted that the testimony involved two issues: (1) Hayes's bias and prejudice and (2) the impeachment of Hayes's prior statements in court. The court ruled that the testimony was inadmissible as it was independent evidence of bias and prejudice.

Defense counsel then proffered that Warren Holmes would testify that he was told by Sion that the original tape recording was made during the Memorial Day weekend. This testimony was excluded by the court over the defendants' objection.

Sion's mother, Helen Sion, testified that she had been present at the time that the recording was made and that this took place at the end of May, 1977, subsequent to an eye operation she had undergone. Records of the date of her operation were placed into evidence.

The wives of both defendants testified that they were with their respective husbands during the entire period of the evening of May 22nd to the morning of May 23, 1977, and that neither defendant left home after retiring to bed between 11 o'clock and midnight on the 22nd.

At the conclusion of all the testimony, the defense renewed its motion for judgment of acquittal, which was denied, and the case was submitted to the jury. During consideration, the jury requested (through a written note) that the condensed tape be sent into the jury room. The court denied this request because the condensed version of the tape had not been introduced into evidence. The defense had previously attempted to introduce, out of the presence of the jury, the testimony of an expert witness who would describe orally and corroborate by photographs the purposeful effort to obliterate certain writings on the face of the condensed tape. However, this evidence was excluded as not being relevant or material to the issues.

The jury returned a verdict of guilty against both defendants and the court entered judgments thereon. Defense counsel then requested a presentence investigation, but inasmuch as Count I was a misdemeanor, no presentence investigation would be allowed on that count. Defense counsel argued that sentencing on the misdemeanor should be deferred pending completion of the presentence investigation and that if the court sentenced the defendants on the misdemeanor alone, then the court would be required to deny bail pursuant to Fla.R.Crim.P. 3.691(a). The court agreed with defense counsel's interpretation of this rule. Defense counsel then inquired whether the court would

consider bail pending appeal if the defendants waived a pre-sentence investigation. The court agreed, and the defendants waived their right to a presentence investigation. Thereupon, the court sentenced the defendants on all charges[4] and ordered that they be taken into custody on the ground that no notice of appeal had been filed and they were, therefore, not entitled to bail pending appeal. The following day, notice of appeal having been filed, the court set appeal bonds on both defendants. Post-trial motions were denied on the grounds that the court lacked jurisdiction. Subsequently, on December 29, 1977, this court temporarily relinquished jurisdiction to afford the trial court an opportunity to rule on the defendants' post-trial motions. Pursuant to this court's order, on January 4, 1978, the trial court conducted a hearing on, and denied, the motions.

The first point of the defendants urges error upon the trial court's refusal to preclude television cameras

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[4]Each defendant was sentenced as follows:

Count I — one year imprisonment in the county jail.

Count II — five years imprisonment in the state penitentiary (to run from the date of the expiration of the sentence in Count I).

Count III — one year imprisonment in the state penitentiary and four years probation (to run from the expiration of the sentence imposed in Count II).

Count IV — five years probation (to run from the expiration of the sentence — and probation — imposed in Count III).

from their trial.[5] Experimental Canon 3 A(7), Code of Judicial Conduct of the State of Florida, was promulgated by the Florida Supreme Court pursuant to its inherent and constitutional power under Article V of the Florida Constitution. The canon establishes standards and criteria for the use of cameras and electronic recording devices in all of Florida's courtrooms. The court, therefore, must be presumed to have considered that the adoption of the canon preserves the rights of the parties.

In determining that a one year trial program should be instituted, the Florida Supreme Court has determined that camera coverage of a trial does not, in and of itself, violate the federal and state constitutions. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1 (Fla. 1976), 337 So.2d 804 (Fla. 1976), 347 So.2d 402 (Fla. 1977), 347 So.2d 404 (Fla. 1977). We, therefore, decline to discuss further the constitutionality per se of the canon, although we will, in view of the importance of the question involved, certify the decision to the Supreme Court of Florida as a question of great public interest.

[1] We pass on to that portion of the defendants' point which urges that matters occurring in their trial pursuant to the experimental canon deprived them of their right to a fair trial and was violative of due process of law. The defendants urge error with regard to two

[5]"Whether the trial court erred in denying defendants' various motions to declare Experimental Canon 3A(7) unconstitutional in refusing to preclude television cameras from defendants' trial and in declining to sequester the trial jury, all contrary to defendants' Sixth and Fourteenth Amendment rights to a fair and impartial trial and due process of law."

rulings allowing television cameras in the courtroom during their trial; error is urged (1) in declining to preclude television cameras from their trial and (2) in declining to sequester the jury. However, the defendants have not met their burden of showing from this record that either of these circumstances operated to deprive them of a fair trial.

We have examined the record in the light of the defendants' contentions under this point and find no reason on this record to hold that the admission of television cameras into this particular trial caused the defendants any difficulty in the preparation or presentation of their case or deprived them of a impartial jury. Accordingly, we hold that no error is shown by the defendants' first point.

[2] The defendants' second point urges that the trial court erred in denying their motion to suppress the tape recorded conversation.[6]

Section 934.02(1), Florida Statutes (1977), defines "wire communication" as

> ". . . any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating

[6]"Whether the trial court erred in denying defendants' motion to suppress the tape recorded oral conversation where that conversation was intercepted and recorded in violation of Chapter 934, Florida Statutes (197[7])."

such facilities for the transmission of intrastate, interstate or foreign communications;"

It is clear that the tape recording in this case was not an interception of a communication transmitted by wire or cable furnished or operated by a common carrier. The defendants engaged in an "open air" conversation while using commercially-sold walkie-talkies or handie-talkies. John Sion heard the conversation by accident when he turned on his short-wave radio receiver. Sion was a private individual who lived in an apartment on the tenth floor of a highrise building near Picciolo's Restaurant, where the conversation of the defendants took place. He had purchased his short-wave-band radio receiver from a commercial retailer of electronic equipment.

At trial, defendant Chandler testified that he and defendant Granger staged a bogus burglary on the air as a part of a wager to see whether anyone was listening. The trial court correctly concluded from the testimony that the defendants did not exhibit a justifiable expectation that their conversation would remain private.

Even without this justification, we would hold that the intercepted conversation is not prohibited by Chapter 934, Florida Statutes (1977).

The third point presented urges that it was prejudicial error for the trial court to deny the defendants' offer into evidence of the condensed version of the taped conversation. It is argued that the condensed version was relevant because: (1) all voice identifications were made from it, and (2) the admission

of the condensed version would have corroborated defendants' alibi defense.

[3-5] Trial courts enjoy a certain discretion in the ruling on the admissibility of evidence. Simply because a defendant thinks that tendered evidence might be beneficial does not make its rejection reversible error. Cf. the principle of law in *Rodriguez v. State,* 327 So.2d 903 (Fla.3d DCA 1976). Nevertheless, where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. See *Watts v. State,* 354 So.2d 145 (Fla.2d DCA 1978). The true test then is whether the tendered condensed version of the taped conversation was relevant to the defense presented. The defendants have failed to present to the trial court or to this court any reasonable theory upon which the admission of the condensed version of the tape would have helped prove their defense. The defendants did not deny having the conversations over the air. The disputed issue was whether the conversations were connected with the robbery with which they were charged. The contents of the condensed version had no relevancy to that issue.

It is suggested that markings or an erasure on the body of the frame holding the tape might have helped prove that the first tape was not made on the night in question. Insofar as this speculative possibiity is concerned, we find no error in the trial court's ruling. The alleged error complained of is not a limitation upon examination or cross-examination, but rather the failure to admit physical evidence.

[6] The defendants' fourth point contends that they were entitled to a judgment of acquittal pursuant

to their motion for a new trial because of the insufficiency of the evidence against them. We hold the evidence to be sufficient. It placed the defendants at the scene of the crime and the taped conversation tied them firmly to the crime as its perpetrators. The fourth point does not present error. See *Lynch v. State,* 293 So.2d 44, 45 (Fla. 1974).

**[7, 8]** The defendants' fifth point deserves a more detailed consideration.[7] The defendants claim that they were deprived of the right of cross-examination and the introduction of evidence to show that one of the State's witnesses, Officer Hayes, was hostile to them. Defense counsel was allowed to develop his theory that Hayes was prejudiced against Chandler and Granger because they had once made a complaint concerning Hayes to

---

[7]Appellants' fifth point attempts to show a multiplicity of errors. It is as follows:

> "Whether the trial court erred in restricting defense counsel's cross-examination of prosecution witnesses and in his direct examination of defense witnesses and exclusion of certain defense exhibits thereby precluding any meaningful confrontation of the evidence presented by the prosecution as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16, of the Constitution of the State of Florida."

We confine ourselves to the point as argued in the brief.

their shift officer.[8] Also, during the presentation of the defendants' case, Officer Wilson was precluded from going further into the matter. We hold that the defendants were allowed sufficient latitude both in their cross-examination and direct examination to present the matter for full consideration by the jury. It may well be that defendants would have liked to give the matter greater prominence but the trial court's ruling was well within the range of the discretion granted to it by the holding of the Supreme Court of Florida in *Eldridge v. State,* 27 Fla. 162, 9 So. 448 (1891).[9] See also *Welch v. State,* 342 So.2d 1070 (Fla. 3d DCA 1977); *Dabney v. Yapa,* 187 So.2d 381 (Fla. 3d DCA 1966); and *H.I. Holding Company v. Dade County,* 129 So.2d 693 (Fla.

---

[8]On cross-examination, Officer Hayes acknowledged that the defendant Chandler and Officer Wilson once complained that Hayes was taking coffee breaks and that Chandler, Wilson and Hayes discussed the matter in a police car. Officer Hayes testified that he did not remember even the gist of the conversation. Officer Wilson was called as a witness by the defendant and after a lengthy discussion outside the jury's presence, the trial court did not permit defense counsel to inquire into the details of this informal complaint.

[9] * * * * * *

"It is competent to show as a fact that a witness is hostile to the party against whom he testifies, and the jury can consider this hostility in estimating his testimony; but an inquiry into the conduct and acts of parties producing the hostility raises another and collateral issue, which should not be permitted to be gone into by the trial judge, otherwise there would be no limit to the investigation of any cause." 9 So. at 452.

* * * * * *

3d DCA 1961). And cf. *Irvin v. State,* 66 So.2d 288, 294 295 (Fla. 1953).

**[9]** The sixth point claims error because there was no presentence investigation. See Florida Rule of Criminal Procedure 3.710. We hold that this rule is not applicable where the defendant specifically waives the investigation. See *Rinaldi v. State,* 343 So.2d 94 (Fla. 3d DCA 1977); and *Johns v. State,* 330 So.2d 526 (Fla. 1st DCA 1976). The defendants' suggestion that the waiver was "forced" is without foundation on this record.

Having considered each point presented and finding no reversible error, the judgments and sentences are affirmed.

Affirmed.

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case Nos. 56,040, 56,194
and 56,236

(District Court of Appeal of the State of Florida, Third District, Case No. 77-2624)

NOEL CHANDLER and
ROBERT GRANGER,

*Appellants,*

*-vs-*

STATE OF FLORIDA,

*Appellee.*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

NOTICE IS HEREBY GIVEN that NOEL CHANDLER and ROBERT GRANGER, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of Florida, affirming the Judgment of Conviction entered herein on September 27, 1979, and made final by denial of a Petition for Rehearing herein on December 10, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED at Miami, Florida this 2nd day of January, 1980.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
*Attorneys for Appellants*
742 N.W. 12th Avenue
Miami, Florida 33136
Tel.: (305) 324-5320

By:
JOEL HIRSCHHORN
[Certificate of Service Omitted]

Filed: January 3, 1980

In re PETITION OF POST-NEWSWEEK STATIONS, FLORIDA, INC. for Change in Code of Judicial Conduct.

No. 46835.

Supreme Court of Florida.

April 7, 1977.

Case of Original Jurisdiction — Code of Judicial Conduct.

Talbot D'Alemberte of Steel, Hector & Davis, Miami, for petitioner.

Joseph C. Jacobs of Ervin, Varn, Jacobs & Odom, Tallahassee, for Fla. Ass'n of Broadcasters, Inc.

Parker Lee McDonald, Orlando, Chairman, for the Fla. Conference of Circuit Judges.

Richard C. McFarlain, Tallahassee, Asst. Director, for The Fla. Bar.

Robert Eagan, State's Atty. and Donald A. Lykkebak, Asst. State's Atty., for State of Fla.

Ellis S. Rubin of Ellis Rubin Law Offices, Miami, for Rommie L. Loudd.

A. Broaddus Livingston, Chairman, Tampa, and Larry S. Stewart, Chairman-Elect, Miami, for Trial Lawyers Section of The Florida Bar.

Gary C. Williams of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Soc. of Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter, intervenor.

Richard E. Gerstein, State's Atty., and N. Joseph Durant, Jr., Chief Asst. State's Atty., for Fla. Prosecuting Attys. Ass'n, amicus curiae.

Harold Peter Barkas, Miami, for Academy of Fla. Trial Lawyers, amicus curiae.

SUPPLEMENTAL INTERLOCUTORY DECISION

SUNDBERG, Justice.

By interlocutory opinion filed in this cause on January 28, 1976, reported at 327 So.2d 1 (Fla.1976), which decision has been several times supplemented to provide, *inter alia,* for inclusion of still camera photography, this Court has sought to have conducted for experimental purposes one televised civil and one televised criminal trial. The purpose of the experimental trials was to provide the Court additional data upon which to base its decision concerning the proposed modification of Canon 3 A(7) of the Code of Judicial Conduct of the State of Florida.

Among the guidelines imposed by the interlocutory decision was the requirement that all participants in such experimental trials consent to the experiment. The Court has met with total failure in securing the conduct of a trial in which all participants will consent, within the deadline of April 1, 1977, for conducting the experimental trials. However, it remains the view of this

Court that a test period during which trials will be conducted at which the electronic media and still photographers will be present is essential to a reasoned decision on the petition for modification of Canon 3 A(7).

Consequently, in order to gain the experience which we deem essential to a proper final determination of this cause, it is the decision of this Court to invoke a pilot program with a duration of one year from July 1, 1977, during which the electronic media, including still photography, may televise and photograph, at their discretion, judicial proceedings, civil, criminal, and appellate, in all courts of the State of Florida, subject only to the prior adoption of standards with respect to types of equipment, lighting and noise levels, camera placement, and audio pickup, and to the reasonable orders and direction of the presiding judge in any such proceedings. To this end, counsel for the respective parties are directed to develop and submit to this Court on or before May 15, 1977, proposed standards concerning technology and conduct for consideration and adoption by the Court prior to July 1, 1977. In the event accord cannot be reached by the parties as to such recommended standards, the respective recommendations of the parties shall be submitted to the Court not later than May 15, 1977, for consideration and resolution. At the request of counsel for any party to these proceedings, a conference may be convened with Justice Sundberg, as conferee of the Court, to clarify and expedite the procedures for development of the proposed standards.

It is so ordered.

OVERTON, C.J., and ADKINS, BOYD, ENGLAND, SUNDBERG, HATCHETT and KARL, JJ., concur.

Supreme Court of the United States

No. A-580

NOEL CHANDLER AND ROBERT GRANGER,
*Petitioners,*

*v.*

FLORIDA

ORDER

UPON CONSIDERATION of the application for continuation of stay and the Attorney General of Florida interposing no opposition thereto,

IT IS ORDERED that the stay of proceedings entered by the Supreme Court of Florida on December 10, 1979, case nos. 56,040, 56,194 and 56,236, is hereby continued pending the filing and disposition of a petition for a writ of certiorari in the above-entitled cause. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

A true copy
MICHAEL RODAK, JR.
Test:
Clerk of The Supreme Court of
the United States
Francis Jordan
Deputy

Dated this 11 day of January, 1980

Supreme Court, U. S.
FILED
JUN 5 1980
JR., CLERK

# APPENDIX

## In the Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-1260**

---

NOEL CHANDLER and ROBERT GRANGER,
*Appellants,*

—*v.*—

STATE OF FLORIDA,
*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

---

**JURISDICTIONAL STATEMENT FILED FEBRUARY 14, 1980**
**PROBABLE JURISDICTION NOTED APRIL 21, 1980**

# In the Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-1260**

---

NOEL CHANDLER and ROBERT GRANGER,
*Appellants,*

—*v.*—

STATE OF FLORIDA,
*Appellee.*

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ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

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**JURISDICTIONAL STATEMENT FILED FEBRUARY 14, 1980**
**PROBABLE JURISDICTION NOTED APRIL 21, 1980**

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## COUNSEL'S NOTATIONS OF REFERENCES TO APPENDIX TO JURISDICTIONAL STATEMENT

The following have been omitted in printing this Appendix because they appear on the designated pages in the Appendix to the Jurisdictional Statement (hereinafter referred to as "App").


1. Former Canon 3A(7), Florida Code of Judicial Conduct, 32 F.S.A. ..... App. 1
2. Present Canon 3A(7), Florida Code of Judicial Conduct, 32 F.S.A. ..... App. 2
3. *Chandler v. State,* 366 So.2d 64 (Fla 3rd DCA 1979) (Affirming Appellants' convictions) .... App. 7
4. *Chandler v. State,* 376 So.2d 1157 (Fla. 1979) (Dismissing Appellants' State Appeal, denying certiorari and holding the "certified" question "moot") ..... App. 3

## CHRONOLOGICAL LIST OF IMPORTANT DATES

1. July 5, 1977 —Effective date of Florida's experimental televised criminal trial rule
2. July 21, 1977 —Appellants' filed motion to declare Florida's experimental Rule 3A(7) Unconstitutional as written and as applied in trial court.
3. July 27, 1977 —Trial Court enters order certifying constitutionality of Rule 3A(7) to Florida Supreme Court.
4. October 25, 1977 —Renewed motion challenging constitutionality of Florida Experimental Rule 3A(7) filed in Trial Court.
5. October 31, 1977 —Written Order denying renewed motion filed in Trial Court.
6. December 5, 1977 —Appellant's Jury Trial commences in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

[R.1117]

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 77-5070A

STATE OF FLORIDA,

*Plaintiff,*

*—vs—*

ROBERT GRANGER and NOEL CHANDLER,

*Defendants.*

MOTION TO DECLARE FLORIDA'S
EXPERIMENTAL RULE 3A(7)
UNCONSTITUTIONAL, AS WRITTEN
AND AS APPLIED

COME NOW the Defendants, by and through their undersigned attorney, and respectfully move this Honorable Court for the entry of an Order declaring Florida's Experimental Rule 3A(7) unconstitutional as written and as applied and, as grounds therefor, the undersigned would show as follows:

1. On or about June 17, 1977, the Florida Supreme Court entered its Order Modifying Canons of Judicial Ethics 3A(7), found in 32 F.S.A. Pocket Part, and Rule 3.110, for the one-year period beginning July 5, 1977 through June 30, 1978, to permit the presence during pre-trial and trial proceedings of television cameras and still photographers for broadcast purposes, either by tape or simultaneous reply; said Experimental Rule also permits the Presiding Judge to allow other members of the media to broadcast live the proceedings.

2. The Defendants feel that if this Court permits live broadcasts of their trial, they will not be able to receive a fair and impartial trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, nor would they receive due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, nor would they receive due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In addition, the Defendants feel that the presence of television cameras will have a harmful and prejudicial effect on prospective witnesses, [R.1118] jurors, their attorney, and possibly even the learned trial judge.

3. The Defendants' case has received a substantial amount of publicity thus far due to the fact that Defendants are City of Miami Beach Police Officers charged with Burglary, among other crimes.

4. As the U.S. Supreme Court said in *Estes v. Texas,* 381 U.S. 532 (1965), the presence of television cameras is legally irrelevant to the fact-finding process and will substantially harm and impair the Defendant's right to a fair and impartial trial free from the possibility of taint; in essence, the United States Supreme Court went on to assert that the presence of television cameras in the courtroom during Defendant's trial will clearly deny the Defendant due process of law.

5. In promulgating Experimental Rule 3A(7) and Rule 3.110, *Florida Rules of Criminal Procedure,* the Florida Supreme Court neglected to take into consideration a defendant's rights and was concerned, apparently, solely with the rights of media. As Justice Hugo Black asserted 36 years ago, in a clash between the First and Sixth Amendments, the First must yield to a defendant's right to a fair and impartial trial free from the possibility of taint and prejudice.

WHEREFORE, the undersigned prays for an appropriate Order declaring the Experimental Rule unconstitutional as written and as applied, or, in the alternative, for an Order prohibiting the presence of live cameras and still photographers during all proceedings herein.

(Signature and Certificate of Service Omitted)

[R.1124]

RENEWED MOTION CHALLENGING CONSTITUTIONALITY OF FLORIDA EXPERIMENTAL RULE 3A(7)

COME NOW the Defendants, by and through their undersigned attorney, and respectfully file this, their Renewed Motion Challenging the constitutionality of Florida's Experimental Canon 3A(7), and, as grounds therefor, would show as follows:

1. Prior hereto, the undersigned filed on behalf of the Defendants a challenge to the constitutionality of Florida's Experimental Canon 3A(7).

2. This Court certified the question of whether Canon 3A(7) was mandatory or discretionary to the Florida Supreme Court. The Florida Supreme Court declined to rule on said Certified Question by dismissing same, apparently concluding that the Certified Question was not dispositive of the cause.

3. Defendants continue to object to the presence of television cameras and still photographers in the courtroom and, therefore, request this Court to enter its Order on Defendants' Motion, a copy of which is attached hereto as if set forth more fully herein, and further request that this Court bar still photographers and television cameras from all proceedings herein.

WHEREFORE, the undersigned prays for such Order as is just and proper.

(Signature and Certificate of Service Omitted).

[R.1128]

DATE OF HEARING Oct 27, 1977

*****

This Mtn to be treated as Mtn to exclude photographers, T.V.'s, & tape recorders — DENIED.

EXCERPTS FROM TRIAL COURT'S CLERK'S MINUTES IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

[R.1104]

[December 5, 1977, prior to Commencement of Jury Selection]

*****

Oral Mtn to remove TV cameras & still photographers from courtroom — Denied. Oral Mtn to sequester the jury — Denied.

*****

[R.1105]

[Trial Jury Sworn]

Renewed Mtn to sequester the jury Denied. (In the absence of the jury).

*****

[R.1107]

[State's testimony begun]

The court recessed the trial of this cause til December 6, 1977. 10:00 A.M.

Renewed request to sequester the jury and also the Witnesses — Den.

*****

RECORD EXCERPTS FROM THE TRIAL IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

[R.55-56]

[December 5, 1977, Preliminary Matters at Trial]

*****

MR. HIRSCHHORN [Defense Attorney]: At this time, even though we have not begun selecting a jury, I would renew my motion pursuant to 3A(7), Florida's Experimental Rule.

I do not see them in the courtroom yet. It is our position that Canon 3A(7) is unconstitutional.

[R.57]

I would ask the Court to preclude the cameras from the courtroom, and still photographs, in the event they appear and, in addition, sequestrate the jury from the outside because I have reason to believe that at some point in time, even though the cameras are not here now, they will be covering portions of this trial. There are cameras outside, and at least two or three television stations outside, and I have been contacted by the media with respect to this case.

THE COURT: Motion denied.

MR. HIRSCHHORN: That is to exclude the cameras. What about sequestering the jury?

THE COURT: Denied.

MR. HIRSCHHORN: Will the Court give the special instruction to the jury?

THE COURT: I will give the ordinary instruction to the jury that I give in each case.

MR. HIRSCHHORN: I also ask the Court, once we start picking the jury, in addition, to sequester the witnesses to the extent that they are instructed not to watch any television accounts of the trial, especially in any portions of their testimony, if any portions of the witness' testimony is televised. In other words, if a witness —

THE COURT: I will instruct the witnesses not [R.58] to watch any television accounts of the trial.

*****

TRIAL COURT PROCEEDINGS CONTINUED,
JURY SELECTION PROCEEDINGS

[R.65]

[Thereupon, counsel for the respective parties and the court reporter approached the bench, and the following proceedings were had outside the hearing of the jury:]

MR. HIRSCHHORN: Your Honor, I just want the record to reflect that the cameras are in the courtroom.

THE COURT: There is a camera.

MR. HIRSCHHORN: There is a portable camera from Channel 10 in the courtroom, and I just want that clearly reflected in the record.

*****

[R.93]

MR. HIRSCHHORN: As you can see, there is a camera right over in that corner right there [indicating]. I do not know if that camera is going to be here throughout the course of the trial, but let me ask you: Are any of you familiar with the case that was recently televised, the Zamora trial? Mrs. Fleming [a prospective juror]?

MRS. FLEMING: Yes.

MR. HIRSCHHORN: So Mr. Vidal [a prospective juror] and Miss Warren [a prospective juror], you are not familiar with that? Let me direct my attention to the four of you, then.

[R.94]

Did you watch any portion of the Zamora trial on television?

MRS. FLEMING: On the news.

MR. BROMBERG [a prospective juror]: Not purposely. I saw some of it.

MR. HIRSCHHORN: Was there anything about the fact that that case was being televised live that would affect you here today? In other words, before you jump to the answer, it is important because not every case is televised.

What I am trying to find out really is will you be able to be as conscientious, as fair and as impartial in this case, even if

that camera remains in this courtroom during part or all of this trial, or are you likely to say to yourself, "Well, there is something special about this case," and perhaps give this case a different kind of treatment than you would.

Mrs. Warren?

MISS WARREN: Yes.

MR. HIRSCHHORN: Mr. Vidal —

THE COURT: That "yes" was —

MR. HIRSCHHORN: It is telling me something, Judge. I understand, but if I might get back to it, Your Honor —

THE COURT: I hesitate to have the record [R.95] leave that "yes" in the record, as is.

MR. HIRSCHHORN: I understand. I will get back to it, if I might, Your Honor.

Mrs. Fleming? Mr. Metzger [a prospective juror]?

MR. METZGER: No.

MR. HIRSCHHORN: Mr. Kane?

MR. KANE [a prospective juror]: No.

MR. HIRSCHHORN: Mr. Bromberg?

MR. BROMBERG: No.

MR. HIRSCHHORN: Miss Warren? Can you hear me now?

MISS WARREN: Yes. I hear you.

MR. HIRSCHHORN: You indicated — perhaps my question was a little wrong — what I am asking is have you ever been on television, Miss Warren?

MISS WARREN: No, I haven't.

MR. HIRSCHHORN: You are likely to be on television as a result of this case. Will that fact affect you in some way?

MISS WARREN: No. I don't believe it will. I don't believe it will.

MR. HIRSCHHORN: What about you, Mr. Vidal?

MR. VIDAL [a prospective juror]: No.

MR. HIRSCHHORN: Any of you?

If the Judge instructs you — By the [R.96] way, have you ever been on television, Miss Warren?

MISS WARREN: No.

MR. HIRSCHHORN: Have you ever been, Mrs. Fleming?

MRS. FLEMING: No.

MR. HIRSCHHORN: Mr. Metzger?

MR. METZGER: Yes.

MR. HIRSCHHORN: You have. Mr. Kane, have you?

MR. KANE: Yes.

MR. HIRSCHHORN: You would have been?

MR. KANE: Yes.

MR. HIRSCHHORN: Mr. Bromberg?

MR. BROMBERG: Yes.

MR. HIRSCHHORN: What have you been on television in connection with?

MR. BROMBERG: Teaching.

MR. HIRSCHHORN: You, Mr. Metzger?

MR. METZGER: Quiz shows.

MR. HIRSCHHORN: National quiz shows?

MR. METZGER: Yes.

MR. HIRSCHHORN: How did you do?

MR. METZGER: Pretty Good.

MR. HIRSCHHORN: You are not the $64,000 expert, are you?

[R.97]

MR. METZGER: No sir.

MR. HIRSCHHORN: Will the fact that you have never been on television before cause you, as a matter of curiosity, to perhaps turn the T.V. on during the course of the trial? If you are instructed, as you will be, I am sure, not to watch anything or to turn on television in order to see yourself in connection with this trial, will you follow that instruction?

THE PROSPECTIVE JURY: Sure.

MR. HIRSCHHORN: In other words, will you resist the temptation to watch yourself, if the Judge says do not. Will you be able to do that?

You have been on television before, so —

May [sic] I clarify the record for the Court, Your Honor?

THE COURT: I believe so.

*****

[R.141]

MR. HIRSCHHORN: In the interest of saving some time, I am going to ask the next series of questions to the four of you, collectively.

As you can see, there is a camera over in the corner there, and I would like to know whether any of the four of you feel that the presence of the camera in the courtroom, recording what you and I are doing here today is likely to affect you in any way, to the best of your ability?

THE PROSPECTIVE JURY: No.

MR. HIRSCHHORN: Have any of the four of you ever been on television?

[R.142]

THE PROSPECTIVE JURY: No.

MR. HIRSCHHORN: If the Judge instructs you not to watch television accounts of this trial, will you be able to follow that instruction?

MR. SQUERO [a prospective juror]: How do you mean?

THE COURT: If I tell you not to watch any news shows or any television accounts of this trial, will you follow that instruction?

MR. SQUERO: If you tell me to, of course, you are ordering.

*****

[R.168]

MR. HIRSCHHORN: Mrs. Madison and Mrs. Hawkins [prospective jurors], as you know I have asked everyone so far that sat on this panel — there is a camera sitting right over there and it may be on now — I don't know — and it may be recording this event, and it may be televised tonight or some other time during the week or in the future. Is there anything about the fact that there is a camera in this courtroom which might give you some [R.169] concern in terms of your ability to be fair and impartial, one way or the other? Mrs. Madison? Mrs. Hawkins?

MRS. MADISON: No.

MRS. HAWKINS: No.

*****

[R.178]

THE COURT: Have you ever served as a juror before, Mr. Cook [a prospective juror]?

MR. COOK: No.

THE COURT: Do you know anything about this case from the media?

MR. COOK: Possibly something from television, but nothing that I can clearly remember.

THE COURT: You did not form any opinions about the guilt or innocence of these defendants, did you?

MR. COOK: I did not.

*****

[R.182]

MR. HIRSCHHORN: Will the presence of the camera in the courtroom and the fact that it is likely, the fact that there is a possibility that portions of this trial may well be telecast tonight or the rest of the week, either in whole or in part, will that affect you in any way?

MR. COOK: No.

[R.183]

MR. HIRSCHHORN: If it does, will you bring it to the Court's attention?

MR. COOK: I will.

*****

[R.196]

[During selection of the alternate juror]

MR. HIRSCHHORN: Would the fact that there is a camera in this courtroom over in the corner there behind the bailiff affect you in any way.

MR. TURNER [a prospective alternate juror]: No.

MR. HIRSCHHORN: If it does, will you bring it to the Court's attention?

MR. TURNER: Yes.

*****

## TRIAL COURT'S PRELIMINARY INSTRUCTIONS TO THE JURY

*****

[R.204]

THE COURT: During the trial, you must not discuss the case among yourselves, nor with anyone else, nor permit anyone to discuss it in your presence. You must also avoid watching, reading, seeing or listening to anything about this case on any of the media. You must confine your deliberations in this case specifically to what you have heard in this courtroom.

*****

[R.205]

MR. HIRSCHHORN: May we renew our request now that the jury is selected, and sequester the jury?

THE COURT: You may renew it. It will be denied.

*****

## TRIAL COURT'S INSTRUCTIONS TO JURY PRIOR TO FIRST NIGHT'S RECESS

*****

[R.349]

THE COURT: It is also very important that you are to avoid seeing and hearing anything about this case as reported in any of the media. Do not read any newspaper articles about it. Perhaps it might be a good idea if you just avoid the local news and watch only the national news on television. If somebody calls out any report of this case to your attention, you may say that is the jury I am serving on. Do not say anything more about it.

It is very important, as I told you, you are not to let anything which happens outside the courtroom interfere. Your decision must be based solely on what happens inside the courtroom.

Ten o'clock tomorrow morning.

[Whereupon, the jury withdrew from the courtroom, and the following proceedings were had:]

[R.350]

MR. HIRSCHHORN: Your Honor, I just wanted to —

THE COURT: Close the door, please.

MR. HIRSCHHORN: Your Honor, I just wanted to renew my request. It is a little late now, but I wanted to renew my request that the jury be sequestered in light of the media coverage, and renew my request that the witnesses be excused — several witnesses have testified so far — and I think Rule 3.87 [sic] in regard to witness sequestration rights — Unless the witnesses are instructed by the Court, not by Mr. Munroe, they are not to watch any television accounts of testimony, I suggest that there is —

THE COURT: There is only the future witnesses which are in issue, not the past witnesses. Future witnesses may not see what the past witnesses — only future witnesses which are in question as far as the admonition is concerned. Is that not true?

MR. HIRSCHHORN: Mr. Dardis may be recalled, certainly recalled in our case.

THE COURT: I will instruct each of you to instruct each of your witnesses not to watch any television coverage of this trial. It is after six o'clock.

MR. HIRSCHHORN: The news goes on at 7:30 [R.351] tonight because the [Miami Dolphins] football game will be on later than that.

THE COURT: The problem you raise is an interesting academic one, but of no practical purpose whatsoever.

MR. HIRSCHHORN: Perhaps the federal court will not see it that way.

THE COURT: The television cameras — no witnesses' testimony was reported or televised in any way.

[Whereupon, at 6:34 p.m., the trial was continued to Tuesday, December 6, 1977.]

DURING DIRECT EXAMINATION BY ASSISTANT STATE ATTORNEY KIRK MONROE OF THE STATE'S "STAR" WITNESS, JOHN SION:

[R.374]

A [By Mr. Sion]: Television shows, no, sir, just talk shows, radio shows — mostly talk shows. It was the only Police Story I ever recorded, which I was planning to use, initially, planning to record.

THE COURT: *Just a moment. Take the jury out.*

[Whereupon, the jury withdrew from the courtroom, and the following proceedings were had:]

THE COURT: *Sir, you are not permitted to do anything with respect to the TV camera during the course of a court session. You will cease doing that.*

*What is your name and your affiliation, sir?*

THE CAMERAMAN: *Gino Bruno, WPLG.*

THE COURT: Fine.

MR. MUNROE: Could I have the last questions and answer read back, Judge?

THE COURT: Read it back.

[Whereupon, the requested portion of the record was read by the reporter as above recorded.]

[Emphasis added.]

EXCERPT OF OBSERVATION OF TELEVISION CAMERA'S PRESENCE DURING TRIAL PROCEEDINGS

[R.522]

MR. HIRSCHHORN: Judge, before we bring in the jury, can I clear the record up on some matters? I would like the record to reflect this is the first recess. I will waive the defendants' presence while I just do some formal matters. This is the first recess since we started, and while the Court observed the camera was not in the courtroom during the

morning session, the camera was in place and in place all during the afternoon session.

*****

COURT'S INSTRUCTIONS TO THE JURY AT THE CONCLUSION OF THE STATE'S CASE.

[R.653]

THE COURT: I am sure it is not necessary to repeat the instructions made at the beginning of the trial and, more specifically, the one I gave you before the nightly recess last night. Please remember and carefully abide by those instructions.

We will see you tomorrow morning at ten o'clock.

[Whereupon, the jury withdrew from the courtroom, and the following proceedings were had:]

*****

COURT'S INSTRUCTIONS TO THE JURY AT THE CONCLUSION OF ALL THE EVIDENCE

*****

[R.923]

MR. HIRSCHHORN: Defendant Chandler rests, Your Honor, and Defendant Granger rests.

THE COURT: Is there any rebuttal?

MR. MUNROE: No. State rests.

THE COURT: Ladies and gentlemen, you have heard all the testimony which is going to be received in this case. Insofar as your services are concerned, we are going to adjourn until ten o'clock tomorrow morning.

Again at this time it is most important, if anything more important than any other time of the trial, that you carefully remember and carefully abide by the instructions I gave you at the beginning of the trial and at the beginning of each of the nightly recesses we have had in the past. Again, remember and abide by those instructions.

Do not form any opinions about the case. Do not discuss it among yourselves or with anyone else in any way. If someone

attempts to discuss it in your presence, please inform me immediately. If you happen [R.924] to overhear or see or be told of anything with relation to the case, please cease that conversation or relation as soon as you can, and report the incident, if it occurs, to me tomorrow morning.

We will see you tomorrow morning at ten o'clock. Please wait outside the courtroom.

Gentlemen, please remain here. We will be in recess for ten minutes.

[Whereupon, the jury withdrew from the courtroom and, after a brief recess, the following proceedings were had:]

*****

Supreme Court, U. S.
FILED
SEP - 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
APPELLANTS,

vs.

THE STATE OF FLORIDA,
APPELLEE.

---

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

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# APPENDIX OF APPELLEE, THE STATE OF FLORIDA

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IN THE CIRCUIT COURT

ELEVENTH JUDICIAL CIRCUIT

OF FLORIDA

CRIMINAL DIVISION

Paul Baker, Judge

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Case No. 77-25123-A

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STATE OF FLORIDA

vs.

RONNEY A. ZAMORA,

defendant

REPORT TO THE SUPREME COURT OF FLORIDA

re:

Conduct of

AUDIO-VISUAL TRIAL COVERAGE

TO:
The Honorable
The Chief Justice
And Justices of The
Supreme Court of Florida

Pursuant to paragraph (9) of the order entered by the Supreme Court of Florida in re: Petition for Post-Newsweek Stations, Florida, Inc. for Change in Code of Judicial Conduct, Case No. 46,835, January Term, A.D. 1977, this Court is submitting a report concerning the media coverage in the trial of State of Florida v. Ronney A. Zamora, (Circuit Court Case No. 77-25123-A). A copy of the Supreme Court's order is attached hereto as Appendix A.

Although the order does not request an evaluation until one year after the pilot program, this report is submitted now because of the great public interest generated by the Zamora case which was televised in its entirety and excerpts of the trial viewed throughout the world.

In addition to worldwide television coverage, the trial was reported extensively in almost every newspaper in the United States and abroad on a daily basis. There

was also extensive coverage on radio and the proceedings were published by news magazines in this and other countries. The articles that appeared in the printed media were, in most instances, accompanied by photographs taken in the courtroom during the course of the trial.

As a result, this Court has received requests for a report from the Supreme Courts of other states as well as the Subcommittee on the Constitution of the United States Senate. In addition, individual trial judges throughout the country have indicated interest in the conduct of the Zamora trial and the various news media have expressed a desire to read this Court's evaluation of the experiment.

This report will address itself specifically to each paragraph of the Supreme Court's order entered June 14, 1977.

1. Equipment and personnel.

(a) One portable television camera was in the courtroom throughout the pro-

ceedings. This camera was operated by WPBT (Public Broadcasting Service) Channel 2, Miami. On no occasion was more than one camera person operating the equipment during the course of the trial.

(b) Prior to commencment of the trial the Court received a request to clarify this subsection of the Supreme Court's order inasmuch as there is a provision for two still cameras and only one still camera photographer. The issue to be clarified concerned the taking of black and white as well as color photographs. After conferring with all interested parties, this Court felt the spirit of the rule would not be violated by permitting one photographer to operate a still camera for black and white photographs and another to operate a still camera for the purpose of taking color photographs.

During the first day of jury selection, the Court observed the operator of the cam-

era taking color photographs moving about the courtoom and he was not using a camera which met the criteria of paragraph (2)(b) of the Supreme Court order. A further controversy arose when the photographer in question was requested to cease photographing. This was resolved by utilizing one still camera photographer with the proper equipment taking both color and black and white photographs.

(c) At the intial conference of judges and media representatives called to implement the Supreme Court's order, only one member from any of the area's radio stations appeared. There was no separate system installed in the courtroom for the purpose of radio broadcasting. There was, however, a facility for audio pickup which was made available by the WPBT, Channel 2. At no time during the course of the trial did the Court receive a request for a separate audio system for radio. Had such a

request been made there would have been no problem in utilizing the existing equipment present in the Court facility.

(d) "Pooling" arrangements among the media were made well in advance of the trial; however, because there were over 60 individual media personnel from local stations and each of the major networks as well as foreign countries, it was necessary in the Court's opinion to appoint a liaison person to act as a coordinator. The network television personnel from out of state and the foreign media personnel were not familiar with the order of the Florida Supreme Court and it was necessary to hold a briefing session in order to familiarize everyone with the procedures to be followed. This briefing was handled by Mr. Steve Tello, News Operations Manager of WPLG TV, Channel 10, whom the Court had appointed as liasion. Any matters that required clarification were communicated to the Court through Mr. Tello and in turn he

conveyed instructions to the media from the Court.

In no instance did any member of the media attempt to bypass the Court-appointed liaison and in no instance did any member of the media fail to cooperate with instructions of the Court relayed through Mr. Tello.

2. Sound and light criteria.

(a) The television and audio equipment used during the course of the Zamora trial produced no distracting sould or light in the opinion of the Court. In speaking privately with the jurors at the conclusion of the trial, the Court ascertained that the presence of cameras (both still and te;evosopm was slightly distracting but not to the extent that it interfered with the jurors considering the testimony and being able to concentrate on the argument of counsel and the Court's instructions. The slight distraction according to the Jury Foreman had nothing to do with the

sound of the cameras or their presence but how they might effect the defendant and his family.

(b) The still cameras used throughout the trial conformed to the specifications set forth by the Supreme Court with the single exception of the color camera employed during the first day of jury selection. That camera was a Nikon which produced a greater sound than the 35mm Leica. After the first day there was no problem concerning still camera equipment.

(c) With the exception of the Nikon camera all equipment utilized during the course of the Zamora trial was demonstrated to the Court. The Nikon camera had also been demonstrated prior to the implementation of the Supreme Court's order and was unanimously rejected by all the judges for use in the courtroom. Had the Court been aware that one of the still cameras intended to be used in this trial was, in

fact, a Nikon its use would have been prohibited.

3. Location of equipment and personnel.

(a) The television camera was positioned in the courtroom in a location which permitted reasonable access to coverage. The camera in question was equipment with a directional microphone and care taken by the operator to avoid activating this equipment when panning over counsel table where attorneys were conferring with each other, the defendant or witnesses. The directional microphone was also turned off when there were conferences at the bench.

During the first three days of the trial the Court noticed that technical personnel and equipment were completely blocking the corridors immediately adjacent to the courtroom. Since these corridors also serve as access routes to the building's emergency exits, it was deemed necessary to allocate a separate room for techni-

cians and equipment. A room immediately adjacent to the judge's chambers was made available and all equipment and technical personnel was moved to this area. Thereafter, the halls were not congested nor were other courts which were in session disturbed by the sound of the television monitors.

(b) The still camera photographer was positioned in a designated seat next to the television camera. With the single exception of the color photographer who appeared on the first day of trial, there was no instance where a still photographer moved about the courtroom or in any way disrupted the court proceedings. It was possible for the still camera photographer to utilize both cameras in such a manner as not to distract from the trial proceedings.

(c) Broadcast media in attendance at trial sat in an area designated for the press and did not utilize independent

facilities for broadcasting trial proceedings.

4. Movement during proceedings.

There was complete compliance with all provisions of paragraph (4.) of the Supreme Court orcer.

5. Courtroom light sources.

The Zamora trial took place in two different courtrooms both of which had inadequate lighting. Prior to the trial, technicians requested an opportunity to increase the light source by making certain modifications. The Court viewed these modifications on the Saturday preceding the commencement of the trial. The initial equipment employed to increase the light source was suspended from the ceiling of the courtroom and required wiring which was taped to the courtroom wall. These fixtures were extremely distractive and also generated an inordinate amount of heat. The type

of equipment employed to increase the lighting within the courtroom gave the appearance of a Hollywood sound stage and it was ordered removed prior to trial. As an alternative the technical people suggested the use of a high intensity bulb which could be placed in the existing ceiling sockets and which would produce neither glare nor heat. Approximately ten to twelve such bulbs were utilized in both courtrooms and they were neither distracting nor uncomfortable. This also eliminated the unsightly wiring.

6. Conferences of counsel.

As previously mentioned, great care was taken by the camera operator to avoid picking up any audio portion of attorneys conferring at counsel table. Care was also taken to avoid audio pickup of bench conferences

7. Impermissible use of media material.

Discussed in Court's recommendations. (See page 20).

8. Appellate review.

Pursuant to the provisions of paragraph (8.), it is this Court's understanding that a trial Court order is presently before the Post-Newsweek Stations, Florida, Inc. The subject matters recited in that order are of genuine concern to both the media and the Court and it is respectfully suggested the Supreme Court consider entertaining the issues raised by that order

9. Evaluation or program.

The issue sought to be resolved in this pilot program is whether or not access to the courts through the medium of electronic media is compatible with the orderly administration of justice.

As Mr. Justice Black observed in Bridges v. California, 314 U.S., at

260, 86 L.Ed.192, 62 S.Ct. 190, 159 ALR 1346:

> "...free speech and fair trials are two of the most cherished policies of our civilization, and it would by a trying task to choose between them."

The question arises whether or not unfettered access to news becomes synonymous with unfettered dissemination. If the answer to this question is in the negative, the next query is where does the authority lie to decide what will be reported and what will not.

It would appear the answer to these questions lies equally between the inherent powers of the Court and the conscience of the media.

As an example, it would be unthinkable for a child to tender years who had been the victim of a rape to be repeatedly photographed on television or in the printed media and suffer the ridicule of her classmates and friends and equally

unthinkable for a trial judge to permit it. The same would apply to the victim of any sexual assault or any case involving a child.

Likewise, it would be prejudicial to the orderly administration of justice to permit the photographing of a police undercover agent or confidential informant when such action could pose a threat to the individual's life or, in the alternative, impede the efforts of law enforcement. Rather than face these issues in a confrontation between the press and the courts, the better practice would appear the media itself establish an enforceable code of ethical conduct to be adhered to by all members of their profession not inconsistent with the code of conduct imposed upon judges and lawyers.

This is not to suggest that trial judges shoudl abdicate their authority and allow the press free rein in deter-

mining what will be reported or disseminated nor, on the other hand, should judges shed their robes and assume the role of the editor, director or producer. It has been shown that in either instance abuses have resulted.

Certainly the most flagrant abuse was the trial of Bruno Hauptman[1] in 1934. However, as Chief Justice Warren Burger points out in Nebraska Press Association v. Stuart, 96 S.Ct.2791 (1976) at 2798:

> "Criticism was directed at the 'carnival' atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession -- including other judges -- pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court."

The Court's feeling was communicated to the media and after the first day of trial there was complete restraint

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1. Hauptman v. New Jersey, 115 N.J. Law 412, 180 A.809, Cert.denied 296 *.S. 649, 56 S.Ct. 310 (1935)

exercised by all reporters from photographing or interviewing trial participants outside the courtroom.

The Courts primary concern throughout this experiment should be to avoid even the "probability that prejudice will result" and that the conduct of a trial with electronic media in the courtroom will not be "deemed inherently lacking in due process". See Estes v. State of Texas, 381, U.S.532, 85 S.Ct.1628, 14 LEd.2d, 543 (1965).

In reversing the conviction of Estes, the Supreme Court of the United States pointed out that there was an absence of any showing of prejudice. In Estes as well as Sheppard it was the trial judge's failure to give adequate instructions and admonitions as well as his failure to insulate the jury from reporters and photographers that caused the Court concern.

This concern is amplified by Mr. Justice Black's comment in In re: Murchison, 349 U.S.133, 136, 75 S.Ct.623, 625, 99 L.Ed. 942 (1955) when he observed:

> " ... our system of law has always endeavored to prevent even the probability of unfairness." (emphasis supplied)

The overhwlming obstacle to this pilot program lies in the United States Supreme Court's decision in Estes. It should be noted that the Estes opinion was authored by Mr. Justice Clark speaking for the majority. He was joined by his brothers Douglas, Goldberg, Harlan and Mr. Chief Justice Warren. Of these five only the Chief Justice, together with Justices Clark, Douglas and Goldberg, were of the view that the televising of trials as well as taking still pictures in the courtroom was in and of itself prejudicial error requiring reversal.

Mr. Justice Harlan did not go that far.

Although concurring in the majority opinion, Justice Harlan was careful to point out that the use of cameras in the courtroom should be judged under the circumstances surrounding Estes only.

In his concurring opinion he took great pains to point out:

> " ...the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. It and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause."

Bearing in mind that Estes was decided June 7, 1965 (the trial having taken place in 1962), it is appropriate that we reevaluate the issue in the light of Justice Harlan's comments.

All of the Justices who concurred in the majority opinion of Estes have left the High Court. Of the four who dissented, three remain.

The day has indeed arrived when television is commonplace in our daily lives. Technical advances over the last ten years have made equipment less obtrusive and the majority of media personnel have come to view their role as the conscience of the community with greater responsibility.

It is appropriate to compare some of the specific criticisms made by Mr. Justice Clark in the Estes opinion to the case sub judice. Justice Clark made reference to the "telltale red lights" on the television cameras which would distract the jury. No such lights were present on the cameras used throughout the Zamora trial. Justice Clark felt the jurors' eyes would be fixed on the cameras rather than the witnesses. This Court took particular note of the jurors throughout the trial and such was not the case. Concern was expressed

in Estes that jurors would be subject to seeing portions of the trial on television or hearing broadcase commentary. This was avoided in the instant trial as previously discussed.

Further concern was expressed that the presence of cameras would have an impact upon witnesses to the extent they would become demoralized and frightened or given to overstatement. Further concern was expressed that in the presence of cameras some witnesses would become "cocky" while other witnesses may suffer from faulty memory and the accuracy of their statements may be severely undermined. In this regard Justice Clark felt that the presence of the cameras could cause embarrassment to witnesses and impede the search for truth and cause a natural tendency toward overdramatization. He felt inquisitive strangers and "cranks" might approach witnesses on the street with

jibes, advice or demands for explanation of their testimony.

No such problems were apparent in Ronney Zamora's trial. This Court must concur with Mr. Justice Clark's concern regarding the possible violation of the rule against witnesses. The rule, or course, is discretionary but when invoked should not be violated. It is felt however the learned justice misplaced his concern when he directed it toward television and radio broadcasts. Trials of great public interest are not confined to the electronic media and are more often reported in greater detail on the printed page. The witness who would violate the rule by watching portions of a trial on television or listen to radio broadcasts is the same witness who would without hesitation devour every word ina newspaper article which he had been instruted not to read. Compliance with the rule is a matter of

integrity on the part of the witness and if he violates the Court's instructions there are sufficient sanctions available to the trial judge to admonish him.

Mr. Justice Clark points out that television is particularly bad where the judge is elected and notes that such is the case in all but six states. He noted that it would be difficult for judges to remain oblivious to the pressures that the news media can bring both directly and through the shaping of public opinion.

This Court, with the deepest respect for Mr. Justice Clark, disagrees.

The judge's conduct in the course of a trial should not be screened from public scrutiny. This is especially true since the judicial branch of government is the only bulwark that stands as a shield between the people and the executive sword. The public has a right to know whether a judge is decisive or

indecisive, attentive or inattentive, courteous or rude, whether or not he can maintain control over the trial proceedings and if he appears learned or confused. To this extent it makes little difference whether the judge is observed by spectators in the courtroom or by spectators viewing television.

However, in light of this concern, this Court specifically requested that prior to the televised proceedings and intermittently throughout the telecast the station announcer caution the public that they were not to set their minds upon a determination of any issue for the reason that they were not seeing the trial in its entirety.

This admonition was also given because Justice Clark's concern that the presence of cameras in the courtroom would have an adverse effect on the defendant. Neither the defendant nor his attorney exhibited

any concern nor raised any objection to the presence of cameras in the Zamora trial trial.

Finally, Mr. Justice Clark addressed himself to the concern that telecasting may deprive an accused of effective counsel. He pointed out there would be distractions, instrusions into confidential attorney-client relationships, and the temptation afforded by television to play to the public audience.

These concerns are real. However, as mentioned elsewhere inthis report, care was taken to insure that no communications between attorney and client were broadcast or even recorded. There was never an intrusion into the attorney-client relationship.

The greater concern of an attorney sacrificing the interests of his client on the altar of counsel's personal ego is far more disturbing. But, here again,

if such were the case appropriate safeguards have been built into the law for post-conviction relief. (See Florida Criminal Rule of Procedure 3.850.) In addition, such conduct on the part of an attorney would be deplorable as to merit disciplinary proceedings by the bar and the Supreme Court.

The Estes case, which is published complete with pictures, shows the atmosphere prevailing in the courtroom was more in tune with a network television studio than a place of justice. These photographs depict not one but a battery of cameras, cables snaking across the courtroom floor and a crowd of reporters that would appear to be attending a press convention rather than a trial. All of these abuses were eliminated in this case not only by virtue of the Supreme Court order but by the excellent self-policing of the media personnel.

It is interesting to note that the Estes trial was viewed by an estimated 100,000 people according to Justice Clark; the worldwide coverage of the Zamora trial was viewed by several million. [2]

The conduct of the Zamora trial in this pilot experiment must be viewed as a success. This was due to the excellent cooperation of all press personnel involved and particularly Mr. Steve Tello who, as the Court appointed liaison, coordinated media activities. This Court received additional assistance from Mr. Joe Averill, attorney for the Miami News, Mr. Jim Spaniola, attorney for The Miami Herald and Mr. Alan Milledge, attorney for WCKT-

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2. State of Florida v. Zamora was listed in T.V. Guide and local newspapers as a regularly scheduled program on WPBT (Channel 2). This trial took place during the Nielsen rating period (A.C. Nielsen Co.) and the results showed on a given evening the Zamora trial was viewed by more people than watched the Johnny Carson show during the same time period on WCKT (Channel 7) the NBC affiliate.

TV, Channel 7. Each of these attorneys conferred with the Court prior to the trial and made themselves available to explain the Supreme Court's order to all media personnel.

Recommendations

1. Equipment and Personnel

(a) No change recommended.

(b) In major trials such as Zamora it is suggested that still camera operators be permitted to take photographs provided one camera person is taking black and white pictures and the other color.

(c) It is recommended the location of cameras be designated in the courtroom by the presiding trial judge rather than the chief judge of the circuit. In the Zamora trial the cameras were originally positioned directly behind counsel table and the camera microphone could pick up even the faintest whisper. This was

changed on the Saturday preceding the trial by the presiding judge because the chief judge could not be located. In a circuit this size it would seem inappropriate to thrust the chief judge into the role of "assistant director" in charge of lights and cameras.

(d) In any trial of great public interest where many media personnel will be participating, it is recommended that a mandatory pretrial conference be held between the court and the press. At this conference a liaison person should be appointed to conduct all further communications between the media and the court.

2. Sound and Light criteria.

(a) No change recommended.

(b) No change recommended.

(c) No change recommended.

3. Location of equipment and personnel.

(a) The same change is recommended here as in 1.(c) above.

There should be a separate room designated for television monitors and technical personnel. Permission should be granted to install telephone equipment at media expense in order not to have reporters using the telephone of judge's secretaries, bailiffs or court reporters. This procedure (except for telephones) was employed during the Zamora trial and both the press corps and the Court found such a facility to be not only very convenient, but more in keeping with the dignity and decorum expected in a Justice building. This room housed all the equipment and personnel without difficulty and the room was completely maintained by the technicians. The morning following the close of the trial the building superintendent had a crew available to clean the room, however the technical people had already removed their equipment, down to the last piece of tape that secured the wires to

the floor and walls, leaving the room in spotless condition.

(b) Again, the same change is recommended as in 1.(c) above.

(c) A specific place in the courtroom should be designated by the trial judge for all reporters in an area assigned to the "press". This permits all media personnel to be subject to directions of the bailiff or court liaison person and offers them an area of privacy where they may take notes undisturbed by surrounding spectators. This would also eliminate clashes between spectators and reporters over who has the right to sit where.

4. Movement during proceedings.

No change recommended.

5. Courtroom light sources.

This Court would again recommend the same change as in 1.(c) above.

6. Conferences of counsel.

No change recommended.

7. Impermissible use of media material.

It is the personal feeling of this Court that video tape and audio reproductions would be of great value to an appellate court in reviewing trial proceedings. The printed record standing alone does not indicate voice inflections, facial expressions, a witness's demeanor, the demeanor of the trial judge or the conduct of counsel. It is recommended the Supreme Court reevaluate its prohibition against the use of film, video tape, still photographs and audio reproductions for the purpose of appellate review at the conclusion of this pilot program.

8. Appellate review.

It is respectfully recommended without comment the Supreme Court address the pending issues in the trial court order filed by Post-Newsweek Stations, Florida, Inc.

9. Evaluation of program.

It is not felt the Zamora trial is itself sufficient to make a final determination concerning the modification of Canon 3A(7). The Court realizes the impact of this report not only on this canon but Canon 35 of the American Bar Association as well. Therefore, in accordance with this paragraph, a final report will be submitted at the conclusion of the pilot program. It is further recommended that in any trial where television and still cameras will be present in the courtroom the trial judge order the jury sequestered if it be a jury trial. It is also recommended witnesses be given strong admonitions by the trial judge concerning their viewing of trial proceedings as well as their reading reports in the printed media.

Further, in each case covered by television and still cameras during this pilot program where there is a jury, the presid-

ing judge should confer with the jurors at the conclusion of the trial, in camera, to elicit their comments and report them to the Supreme Court.

Finally, it is emphatically urged that strong disciplinary action be taken against any attorney or judge who solicits media coverage of a trial for personal or political motives.

Very respectfully submitted,

/s/ PAUL BAKER

PAUL BAKER
Circuit Judge
Eleventh Judicial Circuit
of Florida, Criminal Division

THE ELEVENTH JUDICIAL CIRCUIT
DADE COUNTY, FLORIDA

CASE NO. 79-1
(Court Administration)

| | |
|---|---|
| IN RE: | |
| DESIGNATED LOCATIONS OF TELEVISION CAMERA EQUIPMENT ON THE FOURTH FLOOR OF THE METROPOLITAN DADE COUNTY JUSTICE BUILDING | ADMINISTRATIVE ORDER NO. 79-31 |

PURSUANT TO the Order of April 12, 1979, of the Supreme Court of Florida, entered in Case No. 46,835, the Chief Judge of each Circuit Court in the State of Florida is charged with the responsibility of designating locations for television camera equipment, microphones and still camera equipment in each court facility within such Circuit. To accomplish this end, the Chief Judge of this Circuit and a committee of Judges met with representatives of the several television stations which expressed an interest in televising, from time to time, judicial proceedings in this Circuit and also with representatives of the various newspapers which expressed similar interest.

As the result of such meetings, representatives of such television stations expressed to the Court their preferences with regard to location of television camera equipment within the facilities of the Metropolitan Dade County Justice Building, site of misdemeanor and felony trials in the Eleventh Judicial Circuit. The Chief Judge of the Eleventh Judicial Circuit has reviewed the preferences expressed by the various television stations and consulted with the Judges of the Criminal Divisions of the Eleventh Judicial Circuit of the State of Florida, in and for Dade County, with regard to such preferences. Based upon such review and such consultations, it is

ORDERED as follows:

1. Exhibits A through I, inclusive, attached hereto and incorporated herein are sketches of the courtrooms or judicial facilities located on the fourth floor of the Metropolitan Dade County Justice Building.

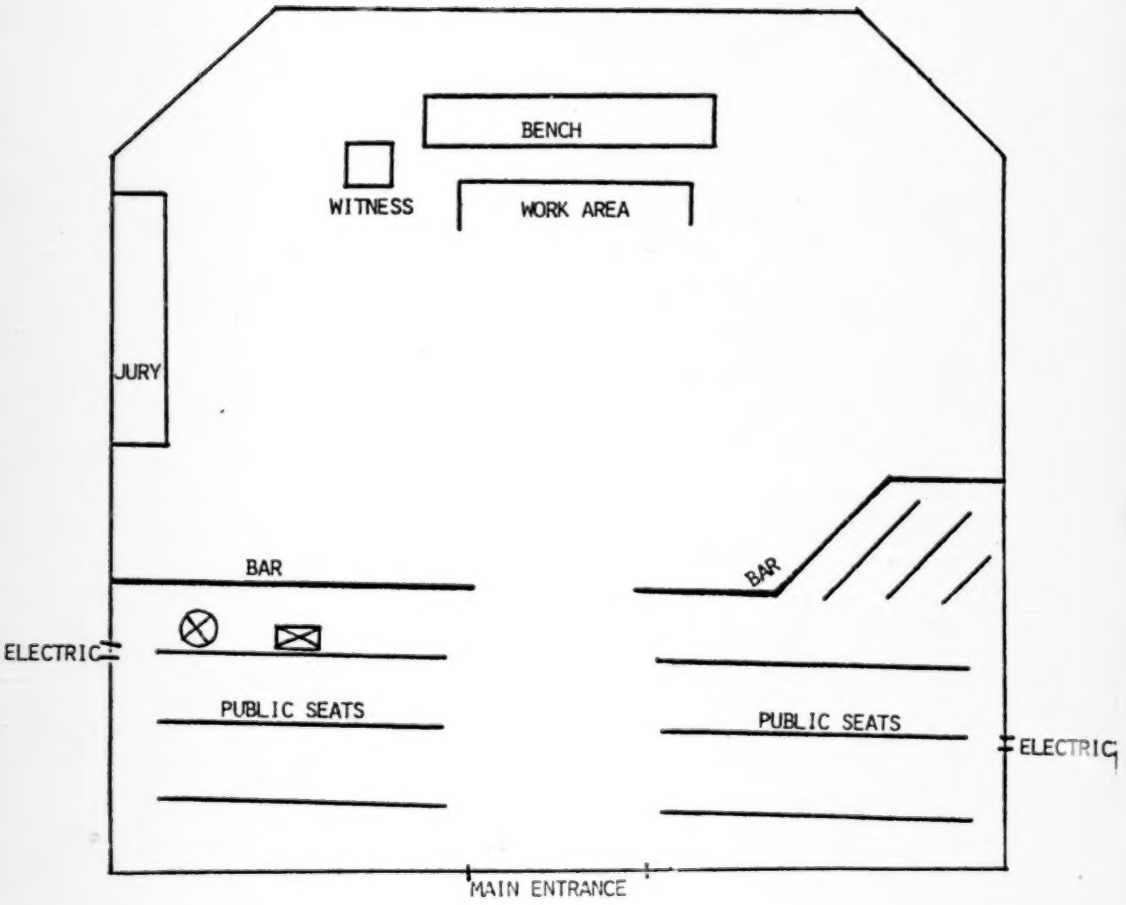
2. The locations of the television cameras in the respective courtrooms or court facilities on the fourth floor of the Metropolitan Dade County Justice Building are designated on Exhibits A through I, inclusive. The designated location of television cameras in indicated by the use on each of the attached exhibits by a circle through which an "X" has been drawn.

3. Any ambiguity resulting from the use of the sketches which are Exhibits A through I, inclusive, may be resolved, on an interim basis, by the presiding judge. Such ambiguity, however, shall not result in exclusion of television camera equipment. Further clarification of any ambiguity in Exhibits A through I, inclusive, may be sought from the Chief Judge by any interested party.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 27th day of April, 1979.

EDWARD D. COWATT, CHIEF JUDGE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

COURTROOM 4-4




⊗ THE FIRST TWO SEATS FROM THE WALL IN THE FIRST ROW ON THE LEFT SIDE OF COURTROOM.

⊠ THE THIRD SEAT FROM THE WALL IN THE FIRST ROW ON THE LEFT SIDE OF COURTROOM.

EXHIBIT D

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# A Sample Survey Of The Attitudes Of Individuals Associated With Trials Involving Electronic Media And Still Photography Coverage In Selected Florida Courts Between July 5, 1977 and June 30, 1978

Prepared By:

The Judicial Planning Coordination Unit

Office Of The State Courts Administrator

* This reproduction does not include the lengthy description of the evolution, structure and methodology of the survey, but does include the survey results.

## Section One

Frequencies

1. Do you feel allowing television, photographic and radio coverage in the courtroom made you more informed about Florida's legal system?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 35.9% | 1. Not at all | 36.9% | 1. Not at all | 58.3% | 1. Not at all | 52.4% |
| 2. Slightly | 15.0% | 2. Slightly | 17.3% | 2. Slightly | 10.2% | 2. Slightly | 15.6% |
| 3. Moderately | 19.7% | 3. Moderately | 16.2% | 3. Moderately | 9.3% | 3. Moderately | 16.3% |
| 4. Very | 21.5% | 4. Very | 20.7% | 4. Very | 17.6% | 4. Very | 8.8% |
| 5. Extremely | 7.9% | 5. Extremely | 8.8% | 5. Extremely | 4.6% | 5. Extremely | 6.8% |
| average response | 2.6 | average response | 2.5 | average response | 2.1 | average response | 2.1 |

2. Do you feel allowing television, photographic and radio coverage in the courtroom made you disrespectful towards Florida's courts?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 87.3% | 1. Not at all | 79.5% | 1. Not at all | 88.9% | 1. Not at all | 83.2% |
| 2. Slightly | 6.5% | 2. Slightly | 8.8% | 2. Slightly | 4.6% | 2. Slightly | 7.4% |
| 3. Moderately | 3.0% | 3. Moderately | 5.1% | 3. Moderately | 2.8% | 3. Moderately | 6.7% |
| 4. Very | 2.1% | 4. Very | 2.8% | 4. Very | 2.8% | 4. Very | 2.0% |
| 5. Extremely | 1.2% | 5. Extremely | 3.7% | 5. Extremely | .9% | 5. Extremely | .7% |
| average response | 1.2 | average response | 1.4 | average response | 1.3 | average response | 1.3 |

3. Do you feel allowing television, photographic, and radio coverage in the courtroom made you more favorable towards the Florida courts?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 51.4% | 1. Not at all | 53.7% | 1. Not at all | 61.1% | 1. Not at all | 64.2% |
| 2. Slightly | 9.7% | 2. Slightly | 9.5% | 2. Slightly | 8.3% | 2. Slightly | 11.5% |
| 3. Moderately | 14.8% | 3. Moderately | 16.6% | 3. Moderately | 12.0% | 3. Moderately | 8.8% |
| 4. Very | 19.0% | 4. Very | 13.4% | 4. Very | 11.1% | 4. Very | 3.8% |
| 5. Extremely | 5.1% | 5. Extremely | 6.8% | 5. Extremely | 7.4% | 5. Extremely | 6.8% |
| average response | 2.2 | average response | 2.1 | average response | 2.1 | average response | 1.9 |

4. How did the presence of television, photographers, photographic equipment or radio coverage in the courtroom affect the dignity of the courtroom proceedings?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Greatly increased | 8.6% | 1. Greatly increased | 10.6% | 1. Greatly increased | 8.3% | 1. Greatly increased | 3.4% |
| 2. Slightly increased | 9.8% | 2. Slightly increased | 12.9% | 2. Slightly increased | 5.6% | 2. Slightly increased | 11.4% |
| 3. No effect | 66.9% | 3. No effect | 49.2% | 3. No effect | 54.6% | 3. No effect | 39.6% |
| 4. Slightly decreased | 11.3% | 4. Slightly decreased | 16.6% | 4. Slightly decreased | 23.1% | 4. Slightly decreased | 30.9% |
| 5. Greatly decreased | 3.4% | 5. Greatly decreased | 10.7% | 5. Greatly decreased | 8.3% | 5. Greatly decreased | 14.8% |
| average response | 2.9 | average response | 3.05 | average response | 3.2 | average response | 3.3 |

5. To what extent did the presence of television, photographic, or radio coverage in the courtroom disrupt the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 77.6% | 1. Not at all | 57.0% | 1. Not at all | 49.1% | 1. Not at all | 41.6% |
| 2. Slightly | 14.3% | 2. Slightly | 24.3% | 2. Slightly | 34.9% | 2. Slightly | 28.9% |
| 3. Moderately | 5.3% | 3. Moderately | 11.1% | 3. Moderately | 10.4% | 3. Moderately | 16.8% |
| 4. Very | 2.6% | 4. Very | 4.4% | 4. Very | 2.8% | 4. Very | 8.7% |
| 5. Extremely | .2% | 5. Extremely | 3.3% | 5. Extremely | 2.8% | 5. Extremely | 4.0% |
| average response | 1.3 | average response | 1.75 | average response | 1.65 | average response | 2.0 |

6. To what extent were you aware of the presence of television, photographic or radio coverage in the courtroom during the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 19.5% | 1. Not at all | 20.0% | 1. Not at all | 3.8% | 1. Not at all | 12.7% |
| 2. Slightly | 55.1% | 2. Slightly | 39.4% | 2. Slightly | 44.3% | 2. Slightly | 39.3% |
| 3. Moderately | 11.9% | 3. Moderately | 15.8% | 3. Moderately | 20.8% | 3. Moderately | 15.3% |
| 4. Very | 9.0% | 4. Very | 16.0% | 4. Very | 18.9% | 4. Very | 21.3% |
| 5. Extremely | 4.5% | 5. Extremely | 8.8% | 5. Extremely | 12.3% | 5. Extremely | 11.3% |
| average response | 2.3 | average response | 2.69 | average response | 2.7 | average response | 2.7 |

7. To what extent did the presence of television, photographic or radio coverage in the courtroom affect your ability to judge the truthfulness of the witness?

| | Juror | | Attorney | |
|---|---|---|---|---|
| 1. | Greatly helped my ability to judge the truthfulness of witness | 2.6% | Greatly helped my ability to judge the truthfulness of witness | 1.4% |
| 2. | Slightly helped my ability to judge the truthfulness of witness | 2.2% | Slightly helped my ability to judge the truthfulness of witness | 2.0% |
| 3. | No effect | 91.4% | No effect | 78.2% |
| 4. | Slightly hindered my ability to judge the truthfulness of witness | 2.6% | Slightly hindered my ability to judge the truthfulness of witness | 12.2% |
| 5. | Greatly hindered my ability to judge the truthfulness of witness | 1.2% | Greatly hindered my ability to judge the truthfulness of witness | 6.1% |
| | average response | 3.0 | average response | 3.1 |

8. To what extent did the presence of television, photographic, or radio coverage in the courtroom affect you from concentrating on the testimony?

| | Juror |
|---|---|
| 1. | Not at all 84.5% |
| 2. | Slightly 9.5% |
| 3. | Moderately 3.2% |
| 4. | Very 2.1% |
| 5. | Extremely .7% |

average response 1.2

9. To what extent did the presence of television, photographic or radio coverage in the courtroom make you self-conscious?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 66.8% | 1. Not at all | 46.4% | 1. Not at all | 42.5% | 1. Not at all | 37.3% |
| 2. Slightly | 21.6% | 2. Slightly | 24.7% | 2. Slightly | 27.4% | 2. Slightly | 36.7% |
| 3. Moderately | 3.9% | 3. Moderately | 12.5% | 3. Moderately | 13.2% | 3. Moderately | 13.3% |
| 4. Very | 4.2% | 4. Very | 9.8% | 4. Very | 14.2% | 4. Very | 8.0% |
| 5. Extremely | 3.5% | 5. Extremely | 6.6% | 5. Extremely | 2.8% | 5. Extremely | 4.7% |
| average response | 1.5 | average response | 2.1 | average response | 1.8 | average response | 2.0 |

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10. To what extent did the presence of television, photographic or radio coverage in the courtroom make you feel more responsible for your actions.

| Juror | | Witness | |
|---|---|---|---|
| 1. Not at all | 76.0% | 1. Not at all | 61.2% |
| 2. Slightly | 7.9% | 2. Slightly | 11.9% |
| 3. Moderately | 6.5% | 3. Moderately | 9.9% |
| 4. Very | 6.3% | 4. Very | 11.8% |
| 5. Extremely | 3.3% | 5. Extremely | 5.2% |
| average response | 1.5 | average response | 1.92 |

11. To what extent did the presence of television, photographic or radio coverage in the courtroom make you nervous?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 74.7% | 1. Not at all | 53.4% | 1. Not at all | 65.1% | 1. Not at all | 60.0% |
| 2. Slightly | 17.9% | 2. Slightly | 26.3% | 2. Slightly | 21.7% | 2. Slightly | 26.7% |
| 3. Moderately | 2.8% | 3. Moderately | 8.0% | 3. Moderately | 5.7% | 3. Moderately | 8.0% |
| 4. Very | 1.4% | 4. Very | 6.6% | 4. Very | 4.7% | 4. Very | 3.3% |
| 5. Extremely | 3.2% | 5. Extremely | 5.8% | 5. Extremely | 2.8% | 5. Extremely | 2.0% |
| average response | 1.4 | average response | 1.9 | average response | 1.49 | average response | 1.5 |

12. To what extent did the presence of television, photographic or radio coverage in the courtroom make you more attentive?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 80.1% | 1. Not at all | 64.2% | 1. Not at all | 61.0% | 1. Not at all | 70.0% |
| 2. Slightly | 9.8% | 2. Slightly | 16.6% | 2. Slightly | 18.1% | 2. Slightly | 19.3% |
| 3. Moderately | 4.8% | 3. Moderately | 9.4% | 3. Moderately | 9.5% | 3. Moderately | 6.7% |
| 4. Very | 3.8% | 4. Very | 6.7% | 4. Very | 3.8% | 4. Very | 3.3% |
| 5. Extremely | 1.4% | 5. Extremely | 3.1% | 5. Extremely | 7.6% | 5. Extremely | .7% |
| average response | 1.4 | average response | 1.7 | average response | 1.82 | average response | 1.5 |

13. To what extent did the presence of television, photographic or radio coverage in the courtroom distract you during the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 77.0% | 1. Not at all | 60.6% | 1. Not at all | 57.0% | 1. Not at all | 40.7% |
| 2. Slightly | 18.7% | 2. Slightly | 23.3% | 2. Slightly | 29.0% | 2. Slightly | 34.0% |
| 3. Moderately | 2.2% | 3. Moderately | 6.7% | 3. Moderately | 7.5% | 3. Moderately | 11.3% |
| 4. Very | 1.0% | 4. Very | 5.5% | 4. Very | 3.7% | 4. Very | 8.7% |
| 5. Extremely | 1.2% | 5. Extremely | 3.9% | 5. Extremely | 2.8% | 5. Extremely | 5.3% |
| average response | 1.3 | average response | 1.76 | average response | 1.6 | average response | 2.0 |

14. During the trial, to what extent did you want to see or hear yourself in the media?

| Juror | | Witness | |
|---|---|---|---|
| 1. Not at all | 72.3% | 1. Not at all | 62.5% |
| 2. Slightly | 18.6% | 2. Slightly | 18.5% |
| 3. Moderately | 5.7% | 3. Moderately | 12.5% |
| 4. Very | 2.9% | 4. Very | 4.2% |
| 5. Extremely | .5% | 5. Extremely | 2.2% |
| average response | 1.4 | average response | 1.68 |

15. During the trial, how did the presence of television, photographic or radio coverage in the courtroom affect your respect for the courts?

| Juror | | Witness | | Court Personnel | |
|---|---|---|---|---|---|
| 1. Greatly increased | 9.8% | 1. Greatly increased | 9.9% | 1. Greatly increased | 10.2% |
| 2. Slightly increased | 9.3% | 2. Slightly increased | 7.6% | 2. Slightly increased | 5.7% |
| 3. No effect | 72.5% | 3. No effect | 66.0% | 3. No effect | 67.6% |
| 4. Slightly decreased | 5.3% | 4. Slightly decreased | 10.7% | 4. Slightly decreased | 13.9% |
| 5. Greatly decreased | 3.1% | 5. Greatly decreased | 5.8% | 5. Greatly decreased | 4.6% |
| average response | 2.8 | average response | 2.98 | average response | 3.0 |

16. To what extent did you feel the presence of television, photographic or radio coverage in the courtroom during the trial made the case more important?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 52.0% | 1. Not at all | 41.9% | 1. Not at all | 55.1% | 1. Not at all | 20.1% |
| 2. Slightly | 20.5% | 2. Slightly | 18.6% | 2. Slightly | 12.1% | 2. Slightly | 16.1% |
| 3. Moderately | 13.9% | 3. Moderately | 18.8% | 3. Moderately | 17.8% | 3. Moderately | 26.8% |
| 4. Very | 9.6% | 4. Very | 11.8% | 4. Very | 7.5% | 4. Very | 23.5% |
| 5. Extremely | 4.0% | 5. Extremely | 8.8% | 5. Extremely | 7.5% | 5. Extremely | 13.4% |
| average response | 1.9 | average response | 2.31 | average response | 2.0 | average response | 3.0 |

17. To what extent did you feel the presence of television, photographic or radio coverage in the courtroom during the testimony of witnesses made that testimony more important?

| Juror | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|
| 1. Not at all | 73.5% | 1. Not at all | 72.6% | 1. Not at all | 44.9% |
| 2. Slightly | 10.1% | 2. Slightly | 11.3% | 2. Slightly | 14.3% |
| 3. Moderately | 6.6% | 3. Moderately | 5.7% | 3. Moderately | 17.0% |
| 4. Very | 7.7% | 4. Very | 5.7% | 4. Very | 13.6% |
| 5. Extremely | 2.1% | 5. Extremely | 4.7% | 5. Extremely | 10.2% |
| average response | 1.5 | average response | 1.57 | average response | 2.4 |

18. Overall, would you favor or oppose allowing television, photographic or radio coverage in the courtroom?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Completely in Favor | 49.1% | 1. Completely in Favor | 41.3% | 1. Completely in Favor | 36.1% | 1. Completely in Favor | 38.9% |
| 2. Slightly in Favor | 15.8% | 2. Slightly in Favor | 14.6% | 2. Slightly in Favor | 11.1% | 2. Slightly in Favor | 17.4% |
| 3. No Opinion | 8.3% | 3. No Opinion | 8.3% | 3. No Opinion | 11.1% | 3. No Opinion | 2.0% |
| 4. Slightly Opposed | 10.7% | 4. Slightly Opposed | 11.5% | 4. Slightly Opposed | 16.7% | 4. Slightly Opposed | 12.8% |
| 5. Completely Opposed | 15.6% | 5. Completely Opposed | 24.3% | 5. Completely Opposed | 25.0% | 5. Completely Opposed | 28.9% |
| average response | 2.2 | average response | 2.61 | average response | 2.87 | average response | 2.57 |

19. To what extent were you concerned that someone may try to harm you in some way because of your appearance as a juror, witness, court staff person or attorney being on television?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 61.4% | 1. Not at all | 71.0% | 1. Not at all | 85.0% | 1. Not at all | 81.8% |
| 2. Slightly | 23.4% | 2. Slightly | 13.0% | 2. Slightly | 8.4% | 2. Slightly | 10.8% |
| 3. Moderately | 6.3% | 3. Moderately | 4.9% | 3. Moderately | 4.7% | 3. Moderately | 4.7% |
| 4. Very | 4.2% | 4. Very | 6.1% | 4. Very | .9% | 4. Very | 1.4% |
| 5. Extremely | 4.7% | 5. Extremely | 5.0% | 5. Extremely | .9% | 5. Extremely | 1.4% |
| average response | 1.7 | average response | 1.6 | average response | 1.29 | average response | 1.25 |

20. To what extent were you concerned that someone may try to harm you in some way because of your appearance as a juror, witness, court staff person or attorney being photographed?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 61.0% | 1. Not at all | 70.5% | 1. Not at all | 85.8% | 1. Not at all | 84.0% |
| 2. Slightly | 23.7% | 2. Slightly | 14.4% | 2. Slightly | 7.5% | 2. Slightly | 10.7% |
| 3. Moderately | 6.5% | 3. Moderately | 5.2% | 3. Moderately | 4.7% | 3. Moderately | 3.3% |
| 4. Very | 4.8% | 4. Very | 4.5% | 4. Very | .9% | 4. Very | 1.3% |
| 5. Extremely | 4.1% | 5. Extremely | 5.3% | 5. Extremely | .9% | 5. Extremely | .7% |
| average response | 1.7 | average response | 1.58 | average response | 1.29 | average response | 1.17 |

21. To what extent were you concerned that someone may try to harm you in some way because of your appearance as a juror, witness, court staff person or attorney being in the newspapers?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 63.9% | 1. Not at all | 72.0% | 1. Not at all | 83.0% | 1. Not at all | 83.3% |
| 2. Slightly | 21.4% | 2. Slightly | 14.1% | 2. Slightly | 10.4% | 2. Slightly | 12.7% |
| 3. Moderately | 6.0% | 3. Moderately | 4.9% | 3. Moderately | 5.7% | 3. Moderately | 2.7% |
| 4. Very | 5.3% | 4. Very | 3.9% | 4. Very | No Resp. | 4. Very | .7% |
| 5. Extremely | 3.4% | 5. Extremely | 5.2% | 5. Extremely | .9% | 5. Extremely | .7% |
| average response | 1.6 | average response | 1.55 | average response | 1.28 | average response | 1.16 |

22. To what extent were you concerned that people would try to harm you in some way because of your appearance as a juror, witness, court staff person or attorney being on radio?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 76.3% | 1. Not at all | 78.8% | 1. Not at all | 88.7% | 1. Not at all | 89.8% |
| 2. Slightly | 14.7% | 2. Slightly | 11.8% | 2. Slightly | 8.5% | 2. Slightly | 8.2% |
| 3. Moderately | 4.1% | 3. Moderately | 3.9% | 3. Moderately | 1.9% | 3. Moderately | 1.4% |
| 4. Very | 2.9% | 4. Very | 3.0% | 4. Very | No Resp. | 4. Very | No Resp. |
| 5. Extremely | 1.9% | 5. Extremely | 2.4% | 5. Extremely | .9% | 5. Extremely | .7% |
| average response | 1.4 | average response | 1.38 | average response | 1.18 | average response | 1.09 |

23. a) To what extent were you concerned that people would know you were serving on a particular jury and try to influence your decision as a result of the television coverage of the trial?

Juror

| | | |
|---|---|---|
| 1. | Not at all | 81.9% |
| 2. | Slightly | 9.8% |
| 3. | Moderately | 4.5% |
| 4. | Very | 1.7% |
| 5. | Extremely | 2.1% |

average response 1.3

23. b) To what extent were you concerned that people would know you were a witness in a particular trial and try to influence your testimony as a result of the television coverage of the trial?

Witness

| | | |
|---|---|---|
| 1. | Not at all | 82.5% |
| 2. | Slightly | 8.5% |
| 3. | Moderately | 3.5% |
| 4. | Very | 3.7% |
| 5. | Extremely | 2.8% |

average response 1.35

24. a) To what extent were you concerned that people would know you were serving on a particular jury and try to influence your decision as a result of the photographic coverage of the trial?

Juror

| | | |
|---|---|---|
| 1. | Not at all | 84.2% |
| 2. | Slightly | 9.0% |
| 3. | Moderately | 3.3% |
| 4. | Very | 1.4% |
| 5. | Extremely | 2.1% |

average response 1.3

24. b) To what extent were you concerned that people would know you were a witness in a particular trial and try to influence your testimony as a result of the photographic coverage of the trial?

Witness

| | | |
|---|---|---|
| 1. | Not at all | 84.0% |
| 2. | Slightly | 8.2% |
| 3. | Moderately | 2.5% |
| 4. | Very | 3.0% |
| 5. | Extremely | 2.4% |

average response 1.32

25. a) To what extent were you concerned that people would know you were serving on a particular jury and try to influence your decision as a result of the radio coverage of the trial?

Juror

| | | |
|---|---|---|
| 1. | Not at all | 88.2% |
| 2. | Slightly | 6.6% |
| 3. | Moderately | 2.4% |
| 4. | Very | 1.4% |
| 5. | Extremely | 1.4% |

average response 1.2

25. b) To what extent were you concerned that people would know you were a witness in a particular trial and try to influence your testimony as a result of the radio coverage of the trial?

Witness

| | | |
|---|---|---|
| 1. | Not at all | 86.1% |
| 2. | Slightly | 7.0% |
| 3. | Moderately | 2.4% |
| 4. | Very | 2.7% |
| 5. | Extremely | 1.9% |

average response 1.27

26. a) To what extent were you concerned that people would know you were serving on a particular jury and try to influence your decision as a result of the newspaper coverage of the trial?

Juror

| | | |
|---|---|---|
| 1. | Not at all | 85.6% |
| 2. | Slightly | 7.8% |
| 3. | Moderately | 3.1% |
| 4. | Very | 1.4% |
| 5. | Extremely | 2.1% |

average response 1.2

26. b) To what extent were you concerned that people would know you were a witness in a particular trial and try to influence your testimony as a result of the newspaper coverage of the trial?

Witness

| | | |
|---|---|---|
| 1. | Not at all | 83.6% |
| 2. | Slightly | 9.0% |
| 3. | Moderately | 1.9% |
| 4. | Very | 3.1% |
| 5. | Extremely | 2.4% |

average response 1.3

27. To what extent did knowing that the proceedings may be televised affect your desire to participate in the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 86.1% | 1. Not at all | 73.2% | 1. Not at all | 80.4% | 1. Not at all | 56.5% |
| 2. Slightly | 5.9% | 2. Slightly | 10.4% | 2. Slightly | 9.3% | 2. Slightly | 20.4% |
| 3. Moderately | 2.8% | 3. Moderately | 4.6% | 3. Moderately | 6.5% | 3. Moderately | 15.6% |
| 4. Very | 2.8% | 4. Very | 5.7% | 4. Very | 1.9% | 4. Very | 4.1% |
| 5. Extremely | 2.4% | 5. Extremely | 6.2% | 5. Extremely | 1.9% | 5. Extremely | 3.4% |
| average response | 1.3 | average response | 1.63 | average response | 1.35 | average response | 1.74 |

28. To what extent did knowing that the proceedings may be on radio affect your desire to participate in the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 91.3% | 1. Not at all | 80.1% | 1. Not at all | 83.2% | 1. Not at all | 68.5% |
| 2. Slightly | 5.0% | 2. Slightly | 7.2% | 2. Slightly | 9.3% | 2. Slightly | 15.1% |
| 3. Moderately | 1.4% | 3. Moderately | 4.4% | 3. Moderately | 3.7% | 3. Moderately | 11.0% |
| 4. Very | 1.0% | 4. Very | 4.1% | 4. Very | 1.9% | 4. Very | 2.7% |
| 5. Extremely | 1.2% | 5. Extremely | 4.2% | 5. Extremely | 1.9% | 5. Extremely | 2.7% |
| average response | 1.2 | average response | 1.45 | average response | 1.3 | average response | 1.5 |

29. To what extent did knowing that the proceedings may be photographed affect your desire to participate in the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 85.1% | 1. Not at all | 76.2% | 1. Not at all | 80.6% | 1. Not at all | 63.3% |
| 2. Slightly | 8.2% | 2. Slightly | 9.4% | 2. Slightly | 12.0% | 2. Slightly | 18.7% |
| 3. Moderately | 2.9% | 3. Moderately | 4.2% | 3. Moderately | 3.7% | 3. Moderately | 10.7% |
| 4. Very | 1.2% | 4. Very | 4.4% | 4. Very | 1.9% | 4. Very | 4.0% |
| 5. Extremely | 2.6% | 5. Extremely | 5.8% | 5. Extremely | 1.9% | 5. Extremely | 3.3% |
| average response | 1.3 | average response | 1.55 | average response | 1.29 | average response | 1.6 |

30. To what extent did knowing that the proceedings may receive newspaper coverage affect your desire to participate in the trial?

| Juror | | Witness | | Court Personnel | | Attorney | |
|---|---|---|---|---|---|---|---|
| 1. Not at all | 87.6% | 1. Not at all | 78.3% | 1. Not at all | 86.1% | 1. Not at all | 65.3% |
| 2. Slightly | 6.2% | 2. Slightly | 8.4% | 2. Slightly | 6.5% | 2. Slightly | 15.3% |
| 3. Moderately | 4.5% | 3. Moderately | 5.7% | 3. Moderately | 4.6% | 3. Moderately | 13.3% |
| 4. Very | .2% | 4. Very | 3.2% | 4. Very | 1.9% | 4. Very | 3.3% |
| 5. Extremely | 1.4% | 5. Extremely | 4.4% | 5. Extremely | .9% | 5. Extremely | 2.7% |
| average response | 1.2 | average response | 1.5 | average response | 1.2 | average response | 1.6 |

32. Please check the photographic equipment and personnel which were visible to you during the court proceeding.

| Juror | |
|---|---|
| 1. Still Camera | 6.4% |
| 2. Movie/Television Camera | 11.4% |
| 3. Still Camera Operators | 1.9% |
| 4. Movie/Television Camera Operators | 6.1% |
| 5. Cable and Electrical Cords | 1.1% |
| 6. All of the above | 13.0% |
| 7. Combination of the above | 60.1% |

| Witness | |
|---|---|
| 1. Still Camera | 6.8% |
| 2. Movie/Television Camera | 10.1% |
| 3. Still Camera Operators | 1.8% |
| 4. Movie/Television Camera Operators | 4.3% |
| 5. Cable and Electrical Cords | 2.0% |
| 6. All of the above | 20.3% |
| 7. Combination of the above | 54.7% |

| Court Personnel | |
|---|---|
| 1. Still Camera | 2.8% |
| 2. Movie/Television Camera | 2.8% |
| 3. Still Camera Operators | No Resps. |
| 4. Movie/Television Camera Operators | 2.8% |
| 5. Cable and Electrical Cords | .9% |
| 6. All of the above | 55.6% |
| 7. Combination of the above | 34.3% |

| Attorney | |
|---|---|
| 1. Still Camera | 2.7% |
| 2. Movie/Television Camera | 1.3% |
| 3. Still Camera Operators | .7% |
| 4. Movie/Television Camera Operators | .7% |
| 5. Cable and Electrical Cords | No Resps. |
| 6. All of the above | 55.7% |
| 7. Combination of the above | 38.9% |

33. Was the presence of the equipment distracting to you personally?

| Juror | | Witness | | Court Personnel | | Attorneys | |
|---|---|---|---|---|---|---|---|
| 1. No | 89.0% | 1. No | 79.0% | 1. No | 74.0% | 1. No | 58.1% |
| 2. Yes | 11.0% | 2. Yes | 21.0% | 2. Yes | 26.0% | 2. Yes | 41.9% |
| average response | 1.1 | average response | 1.3 | average response | 1.3 | average response | 1.39 |

Section Two

Frequencies

1. a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the attorney's self-conscious?

   b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the opposing attorney self-conscious?

   c. To what extent did the presence of television, photographic or radio coverage in the courtroom make you self-conscious?

a. Court Personnel

| | | |
|---|---|---|
| 1. | Not at all | 35.6% |
| 2. | Slightly | 32.7% |
| 3. | Moderately | 16.8% |
| 4. | Very | 9.9% |
| 5. | Extremely | 5.0% |

average response 2.1

b. Attorney's view of opposing attorney

| | | |
|---|---|---|
| 1. | Not at all | 42.5% |
| 2. | Slightly | 32.1% |
| 3. | Moderately | 17.9% |
| 4. | Very | 4.5% |
| 5. | Extremely | 3.0% |

average response 2.0

c. Attorney's view of him/herself

| | | |
|---|---|---|
| 1. | Not at all | 37.3% |
| 2. | Slightly | 36.7% |
| 3. | Moderately | 13.3% |
| 4. | Very | 8.0% |
| 5. | Extremely | 4.7% |

average response 2.0

2. a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the attorney's actions flamboyant?

   b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the opposing attorney's actions flamboyant?

   c. To what extent did the presence of television, photographic or radio coverage in the courtroom make your actions flamboyant?

| a. Court Personnel | | b. Attorney's view of opposing attorney | | c. Attorney's view of him/herself | |
|---|---|---|---|---|---|
| 1. Not at all | 44.3% | 1. Not at all | 54.8% | 1. Not at all | 79.3% |
| 2. Slightly | 30.2% | 2. Slightly | 18.5% | 2. Slightly | 14.7% |
| 3. Moderately | 17.0% | 3. Moderately | 17.8% | 3. Moderately | 4.7% |
| 4. Very | 4.7% | 4. Very | 5.9% | 4. Very | 1.3% |
| 5. Extremely | 3.8% | 5. Extremely | 3.0% | 5. Extremely | 0 |
| average response | 1.9 | average response | 1.8 | average response | 1.3 |

3. a. To what extent did the presence of television, photographic, or radio coverage in the courtroom make the attorney's more attentive?

b. To what extent did the presence of television, photographic, or radio coverage in the courtroom make the opposing attorney more attentive?

c. To what extent did the presence of television, photographic, or radio coverage in the courtroom make you more attentive?

a. Court Personnel

| | |
|---|---|
| 1. Not at all | 46.0% |
| 2. Slightly | 25.0% |
| 3. Moderately | 15.0% |
| 4. Very | 9.0% |
| 5. Extremely | 5.0% |

average response 2.1

b. Attorney's view of opposing attorney

| | |
|---|---|
| 1. Not at all | 66.4% |
| 2. Slightly | 18.4% |
| 3. Moderately | 12.8% |
| 4. Very | 1.6% |
| 5. Extremely | .8% |

average response 1.6

c. Attorney's view of him/herself

| | |
|---|---|
| 1. Not at all | 70.0% |
| 2. Slightly | 19.3% |
| 3. Moderately | 6.7% |
| 4. Very | 3.3% |
| 5. Extremely | .7% |

average response 1.5

4. a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the attorney's nervous?

   b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the opposing attorney nervous?

   c. To what extent did the presence of television, photographic or radio coverage in the courtroom make you nervous?

| a. Court Personnel | | b. Attorney's view of opposing attorney | | c. Attorney's view of him/herself | |
|---|---|---|---|---|---|
| 1. Not at all | 52.9% | 1. Not at all | 59.8% | 1. Not at all | 60.0% |
| 2. Slightly | 32.4% | 2. Slightly | 27.9% | 2. Slightly | 26.7% |
| 3. Moderately | 6.9% | 3. Moderately | 5.7% | 3. Moderately | 8.0% |
| 4. Very | 4.9% | 4. Very | 4.9% | 4. Very | 3.3% |
| 5. Extremely | 2.9% | 5. Extremely | 1.6% | 5. Extremely | 2.0% |
| average response | 1.7 | average response | 1.5 | average response | 1.5 |

5. a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the attorneys better prepared?

   b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the opposing attorney better prepared?

   c. To what extent did the presence of television, photographic or radio coverage in the courtroom make you better prepared?

| a. Court Personnel | | b. Attorney's view of opposing attorney | | c. Attorney's view of him/herself | |
|---|---|---|---|---|---|
| 1. Not at all | 63.7% | 1. Not at all | 78.1% | 1. Not at all | 73.3% |
| 2. Slightly | 14.7% | 2. Slightly | 15.6% | 2. Slightly | 13.3% |
| 3. Moderately | 8.8% | 3. Moderately | 3.9% | 3. Moderately | 7.3% |
| 4. Very | 5.9% | 4. Very | 1.6% | 4. Very | 3.3% |
| 5. Extremely | 6.9% | 5. Extremely | .8% | 5. Extremely | 2.7% |
| average response | 1.8 | average response | 1.4 | average response | 1.5 |

6. a. To what extent did the presence of television, photographic or radio coverage in the courtroom distract the attorneys?

   b. To what extent did the presence of television, photographic or radio coverage in the courtroom distract the opposing attorney?

   c. To what extent did the presence of television, photographic or radio coverage in the courtroom distract you?

| a. Court Personnel | | b. Attorney's view of opposing attorney | | c. Attorney's view of him/herself | |
|---|---|---|---|---|---|
| 1. Not at all | 53.3% | 1. Not at all | 53.2% | 1. Not at all | 40.7% |
| 2. Slightly | 36.2% | 2. Slightly | 29.8% | 2. Slightly | 34.0% |
| 3. Moderately | 4.8% | 3. Moderately | 9.7% | 3. Moderately | 11.3% |
| 4. Very | 2.9% | 4. Very | 4.8% | 4. Very | 8.7% |
| 5. Extremely | 2.9% | 5. Extremely | 2.4% | 5. Extremely | 5.3% |
| average response | 1.6 | average response | 1.7 | average response | 2.0 |

## Section Three

Frequencies

1. To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses self-conscious?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 14.6% | 1. Not at all | 24.1% |
| 2. Slightly | 36.9% | 2. Slightly | 28.4% |
| 3. Moderately | 33.0% | 3. Moderately | 19.1% |
| 4. Very | 5.8% | 4. Very | 16.3% |
| 5. Extremely | 9.7% | 5. Extremely | 12.1% |
| average response | 2.5 | average response | 2.5 |

2. To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses more cooperative?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 79.2% | 1. Not at all | 83.2% |
| 2. Slightly | 10.9% | 2. Slightly | 9.8% |
| 3. Moderately | 4.0% | 3. Moderately | 4.2% |
| 4. Very | 5.0% | 4. Very | 2.1% |
| 5. Extremely | 1.0% | 5. Extremely | .7% |
| average response | 1.4 | average response | 1.3 |

3. To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses more nervous?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 22.3% | 1. Not at all | 24.8% |
| 2. Slightly | 43.7% | 2. Slightly | 32.6% |
| 3. Moderately | 19.4% | 3. Moderately | 16.3% |
| 4. Very | 6.8% | 4. Very | 13.5% |
| 5. Extremely | 7.8% | 5. Extremely | 12.8% |
| average response | 2.2 | average response | 2.5 |

4. To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses more attentive?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 54.8% | 1. Not at all | 64.7% |
| 2. Slightly | 21.2% | 2. Slightly | 25.9% |
| 3. Moderately | 16.3% | 3. Moderately | 4.3% |
| 4. Very | 5.8% | 4. Very | 3.6% |
| 5. Extremely | 1.9% | 5. Extremely | 1.4% |
| average response | 1.8 | average response | 1.5 |

5. To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses act flamboyant?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 65.4% | 1. Not at all | 68.1% |
| 2. Slightly | 19.2% | 2. Slightly | 17.0% |
| 3. Moderately | 10.6% | 3. Moderately | 9.9% |
| 4. Very | 2.9% | 4. Very | 3.5% |
| 5. Extremely | 1.9% | 5. Extremely | 1.4% |
| average response | 1.5 | average response | 1.5 |

6. To what extent did the presence of television, photographic or radio coverage in the courtroom distract witnesses?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 36.2% | 1. Not at all | 37.2% |
| 2. Slightly | 40.0% | 2. Slightly | 28.3% |
| 3. Moderately | 13.3% | 3. Moderately | 13.8% |
| 4. Very | 4.8% | 4. Very | 9.7% |
| 5. Extremely | 5.7% | 5. Extremely | 11.0% |
| average response | 2.0 | average response | 2.2 |

7. To what extent did the presence of television, photographic or radio coverage in the courtroom inhibit witnesses?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 44.6% | 1. Not at all | 44.1% |
| 2. Slightly | 40.6% | 2. Slightly | 21.0% |
| 3. Moderately | 7.9% | 3. Moderately | 14.7% |
| 4. Very | 4.0% | 4. Very | 11.9% |
| 5. Extremely | 3.0% | 5. Extremely | 8.4% |
| average response | 1.7 | average response | 2.2 |

8. To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge self-conscious?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 60.4% | 1. Not at all | 42.3% |
| 2. Slightly | 25.5% | 2. Slightly | 21.2% |
| 3. Moderately | 3.8% | 3. Moderately | 18.2% |
| 4. Very | 7.5% | 4. Very | 8.8% |
| 5. Extremely | 2.8% | 5. Extremely | 9.5% |
| average response | 1.5 | average response | 2.2 |

9. To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge more attentive?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 66.0% | 1. Not at all | 45.7% |
| 2. Slightly | 17.0% | 2. Slightly | 27.1% |
| 3. Moderately | 7.5% | 3. Moderately | 16.4% |
| 4. Very | 5.7% | 4. Very | 6.4% |
| 5. Extremely | 3.8% | 5. Extremely | 4.3% |
| average response | 1.7 | average response | 2.0 |

10. To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge nervous?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 78.1% | 1. Not at all | 60.1% |
| 2. Slightly | 14.3% | 2. Slightly | 23.2% |
| 3. Moderately | 3.8% | 3. Moderately | 10.1% |
| 4. Very | 3.8% | 4. Very | 2.9% |
| 5. Extremely | 0 | 5. Extremely | 3.6% |
| average response | 1.3 | average response | 1.6 |

11. To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge better prepared?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 77.1% | 1. Not at all | 74.1% |
| 2. Slightly | 13.3% | 2. Slightly | 9.4% |
| 3. Moderately | 4.8% | 3. Moderately | 7.2% |
| 4. Very | 1.0% | 4. Very | 7.2% |
| 5. Extremely | 3.8% | 5. Extremely | 2.2% |
| average response | 1.5 | average response | 1.6 |

12. To what extent did the presence of television, photographic or radio coverage in the courtroom distract the judge?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 59.4% | 1. Not at all | 57.6% |
| 2. Slightly | 24.5% | 2. Slightly | 23.7% |
| 3. Moderately | 9.4% | 3. Moderately | 10.1% |
| 4. Very | 3.8% | 4. Very | 4.3% |
| 5. Extremely | 2.8% | 5. Extremely | 4.3% |
| average response | 1.6 | average response | 1.7 |

13. To what extent did the presence of television, photographic or radio coverage in the courtroom make the jurors self-conscious?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 29.0% | 1. Not at all | 32.6% |
| 2. Slightly | 36.0% | 2. Slightly | 26.4% |
| 3. Moderately | 18.0% | 3. Moderately | 17.8% |
| 4. Very | 11.0% | 4. Very | 12.4% |
| 5. Extremely | 6.0% | 5. Extremely | 10.9% |
| average response | 2.3 | average response | 2.4 |

14. To what extent did the presence of television, photographic or radio coverage in the courtroom make the jurors more attentive?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 55.1% | 1. Not at all | 55.4% |
| 2. Slightly | 21.4% | 2. Slightly | 26.9% |
| 3. Moderately | 11.2% | 3. Moderately | 14.6% |
| 4. Very | 8.2% | 4. Very | 2.3% |
| 5. Extremely | 4.1% | 5. Extremely | .8% |
| average response | 1.9 | average response | 1.7 |

15. To what extent did the presence of television, photographic or radio coverage in the courtroom make the jurors nervous?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 41.0% | 1. Not at all | 42.7% |
| 2. Slightly | 29.0% | 2. Slightly | 28.2% |
| 3. Moderately | 15.0% | 3. Moderately | 15.3% |
| 4. Very | 9.0% | 4. Very | 7.6% |
| 5. Extremely | 6.0% | 5. Extremely | 6.1% |
| average response | 2.0 | average response | 2.0 |

16. To what extent did the presence of television, photographic or radio coverage in the courtroom distract the jurors?

| Court Personnel | | Attorney | |
|---|---|---|---|
| 1. Not at all | 47.0% | 1. Not at all | 36.1% |
| 2. Slightly | 28.0% | 2. Slightly | 30.8% |
| 3. Moderately | 16.0% | 3. Moderately | 12.0% |
| 4. Very | 3.0% | 4. Very | 15.0% |
| 5. Extremely | 6.0% | 5. Extremely | 6.0% |
| average response | 1.8 | average response | 2.2 |

ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
ADMINISTRATIVE OFFICE OF THE COURTS
DADE COUNTY COURTHOUSE
MIAMI, FLORIDA 33130

EDWARD D. COWART
CHIEF JUDGE
WILLIAM A. HERIN
SENIOR JUDGE

WILBUR S. McDUFF
EXECUTIVE OFFICER

August 4, 1980

MEMORANDUM TO:

Mr. Joel Rosenblatt
Mr. Calvin Fox
Attorney General's Office

Enclosed herewith please find the following information requested by your office:

(a) Statistical information gathered from this office and the information available in the Clerk's computer records involving jury and non-jury trials in Dade County courts (1979-80).

(b) Survey of cases utilizing cameras in the courtroom.

(c) Administrative Orders of the Chief Judge dealing with locations of still camera equipment, television camera equipment and microphones in our court facilities.

Please do not hesitate to contact us if there is anything further you need.

ROGER A. SILVER
Deputy Court Administrator

RAS/ges
Encls.

TRIALS (1979)

From computer records information supplied by William Norton, AOC (Civil Cases) and Phillip Clark, AOC (Criminal Cases)

I. CIRCUIT COURT - General Jurisdiction Division

| | | |
|---|---|---|
| Jury Trials | 721 | |
| Non-Jury Trials | 2,482 | |
| Sub-Total | | 3,203 |

CIRCUIT COURT - Criminal Division

| | | |
|---|---|---|
| Jury Trials | 309 | |
| Bench Trials | 288 | |
| Sub-Total | | 597 |

CIRCUIT COURT - Family Division, Family Civil Department

| | |
|---|---|
| Non-Jury Trials | 4,190 |
| Circuit Court Total | 7,990 |

II. COUNTY COURT - Crimes Division

| | | |
|---|---|---|
| Jury Trials | 26 | |
| Non-Jury Trials | 1,780 | |
| Sub-Total | | 1,806 |

COUNTY COURT - Civil Division

A. Central District (Courthouse)

| | | |
|---|---|---|
| Jury Trials | 6 | |
| Non-Jury Trials: | | |
| Summary Procedure (SP) | 5,217 | |
| County Civil (CC) | 539 | |
| Sub-Total | | 6,762 |

TRIALS (1979)

II. COUNTY COURT - Civil Division (Cont'd)

B. Northwest District

Non-Jury Trials:
Summary Procedure (SP) 142
County Civil (CC) 56

Sub-Total---------- 198

C. North Central District

Non-Jury Trials:
Summary Procedure (SP) 229
County Civil (CC) 91

Sub-Total---------- 320

D. North District

Non-Jury Trials:
Summary Procedure (SP) 248
County Civil (CC) 127

Sub-Total---------- 375

E. East District (Miami Beach)

(Not Reported)

F. South Central District

(Not Reported)

G. South District (Cutler Ridge)

(Not Reported)

County Court Total----------9,461

Supreme Court, U. S.
FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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No. 79-1260

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NOEL CHANDLER and ROBERT GRANGER,

Appellants,

against

THE STATE OF FLORIDA,

Appellee.

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On Appeal from the Supreme Court of Florida

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# Reports cited in Brief of the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as amici curiae in support of appellee

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Contents

Judge Paul Baker, Report to the Supreme Court of Florida re: Conduct of Audio-Visual Trial Coverage

Judge Thomas E. Sholts, Report to the Supreme Court or Florida re: Conduct of Audio-Visual Trial Coverage

Judge Marvin Mounts, Jr., Report to the Supreme Court of Florida Concerning Audio-Visual Trial Coverage

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Washington Bench-Bar-Press Committee, Subcommittee on Canon 35, Report, April 5, 1975

Judge Guy E. Humphries, Jr., Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom

Media Advisory Committee, Interim Report to the Chief Judge of the New York State Court of Appeals, May 30, 1980

Judge Paul Baker, Report
to the Supreme Court of
Florida re: Conduct
of Audio-Visual
Trial Coverage

# In the Circuit Court
# Eleventh Judicial Circuit
# of Florida
# Criminal Division

**Paul Baker, Judge**

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**Case No. 77-25123-A**

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STATE OF FLORIDA

*v.*

RONNEY A. ZAMORA,

*defendant*

**Report To**

**The Supreme Court of Florida**

re:

Conduct of

**AUDIO-VISUAL TRIAL COVERAGE**

To:
The Honorable
The Chief Justice
And Justices Of The
Supreme Court of Florida

Pursuant to paragraph (9) of the order entered by the Supreme Court of Florida in re: Petition of Post-Newsweek Stations, Florida, Inc. for Change in Code of Judicial Conduct, Case No. 46,835, January Term, A.D. 1977, this Court is submitting a report concerning the media coverage in the trial of State of Florida v. Ronney A. Zamora, (Circuit Court Case No. 77-25123-A). A copy of the Supreme Court's order is attached hereto as Appendix A.

Although the order does not request an evaluation until one year after the pilot program, this report is submitted now because of the great public interest generated by the Zamora case which was televised in its entirety and excerpts of the trial viewed throughout the world.

In addition to worldwide television coverage, the trial was reported extensively in almost every newspaper in the United States and abroad on a daily basis. There was also extensive coverage on radio and the proceedings were published by news magazines in this and other countries. The articles that appeared in the printed media were, in most instances, accompanied by photographs taken in the courtroom during the course of the trial.

As a result, this Court has received requests for a report from the Supreme Courts of other states as well as the Subcommittee on the Constitution of the United States Senate. In addition, individual trial judges throughout the country have indicated interest in the conduct of the Zamora trial and the various news media

have expressed a desire to read this Court's evaluation of the experiment.

This report will address itself specifically to each paragraph of the Supreme Court's order entered June 14, 1977.

1. **Equipment and personnel.**

(a) One portable television camera was in the courtroom throughout the proceedings. This camera was operated by WPBT (Public Broadcasting Service) Channel 2, Miami. On no occasion was more than one camera person operating the equipment during the course of the trial.

(b) Prior to commencement of the trial the Court received a request to clarify this subsection of the Supreme Court's order inasmuch as there is a provision for two still cameras and only one still camera photographer. The issue to be clarified concerned the taking of black and white as well as color photographs. After conferring with all interested parties, this Court felt the spirit of the rule would not be violated by permitting one photographer to operate a still camera for black and white photographs and another to operate a still camera for the purpose of taking color photographs.

During the first day of jury selection, the Court observed the operator of the camera taking color photographs moving about the courtroom and he was not using a camera which met the criteria of paragraph



(2)(b) of the Supreme Court order. A further controversy arose when the photographer in question was requested to cease photographing. This was resolved by utilizing one still camera photographer with the proper equipment taking both color and black and white photographs.

(c) At the initial conference of judges and media representatives called to implement the Supreme Court's order, only one member from any of the area's radio stations appeared. There was no separate system installed in the courtroom for the purpose of radio broadcasting. There was, however, a facility for audio pickup which was made available by the WPBT, Channel 2. At no time during the course of the trial did the Court receive a request for a separate audio system for radio. Had such a request been made there would have been no problem in utilizing the existing equipment present in the Court facility.

(d) "Pooling" arrangements among the media were made well in advance of the trial; however, because there were over 60 individual media personnel from local stations and each of the major networks as well as foreign countries, it was necessary in the Court's opinion to appoint a liaison person to act as a coordinator. The network television pesonnel from out of state and the foreign media personnel were not familiar with the order of the Florida Supreme Court and it was necessary to hold a briefing session in order to familiarize everyone with the procedures to be followed. This briefing was handled by Mr. Steve Tello, News Operations Manager of WPLG TV, Channel 10, whom the Court had appointed as liasion. Any matters that required

clarification were communicated to the Court through Mr. Tello and in turn he conveyed instructions to the media from the Court.

In no instance did any member of the media attempt to bypass the Court-appointed liaison and in no instance did any member of the media fail to cooperate with instructions of the Court relayed through Mr. Tello.

2. **Sound and light criteria.**

(a) The television and audio equipment used during the course of the Zamora trial produced no distracting sound or light in the opinion of the Court. In speaking privately with the jurors at the conclusion of the trial, the Court ascertained that the presence of cameras (both still and television) was slightly distracting but not to the extent that it interfered with the jurors considering the testimony and being able to concentrate on the argument of counsel and the Court's instructions. The slight distraction according to the Jury Foreman had nothing to do with the sound of the cameras or their presence but how they might effect the defendant and his family.

(b) The still cameras used throughout the trial conformed to the specifications set forth by the Supreme Court with the single exception of the color camera employed during the first day of jury selection. That camera was a Nikon which produced a greater sound than the 35mm Leica. After the first day there was no problem concerning still camera equipment.



(c) With the exception of the Nikon camera all equipment utilized during the course of the Zamora trial was demonstrated to the Court. The Nikon camera had also been demonstrated prior to the implementation of the Supreme Court's order and was unanimously rejected by all the judges for use in the courtroom. Had the Court been aware that one of the still cameras intended to be used in this trial was, in fact, a Nikon its use would have been prohibited.

3. **Location of equipment and personnel.**

(a) The television camera was positioned in the courtroom in a location which permitted reasonable access to coverage. The camera in question was equipped with a directional microphone and care taken by the operator to avoid activating this equipment when panning over counsel table where attorneys were conferring with each other, the defendant or witnesses. The directional microphone was also turned off when there were conferences at the bench.

During the first three days of the trial the Court noticed that technical personnel and equipment were completely blocking the corridors immediately adjacent to the courtroom. Since these corridors also serve as access routes to the building's emergency exits, it was deemed necessary to allocate a separate room for technicians and equipment. A room immediately adjacent to the judge's chambers was made available and all equipment and technical personnel was moved to this area. Thereafter, the halls were not congested nor were other courts which were in session disturbed by the sound of the television monitors.

(b) The still camera photographer was positioned in a designated seat next to the television camera. With the single exception of the color photographer who appeared on the first day of trial, there was no instance where a still photographer moved about the courtroom or in any way disrupted the court proceedings. It was possible for the still camera photographer to utilize both cameras in such a manner as not to distract from the trial proceedings.

(c) Broadcast media in attendance at the trial sat in an area designated for the press and did not utilize independent facilities for broadcasting trial proceedings.

4. **Movement during proceedings.**

There was complete compliance with all provisions of paragraph (4.) of the Supreme Court order.

5. **Courtroom light sources.**

The Zamora trial took place in two different courtrooms both of which had inadequate lighting. Prior to the trial, technicians requested an opportunity to increase the light source by making certain modifications. The Court viewed these modifications on the Saturday preceding the commencement of the trial. The initial equipment employed to increase the light source was suspended from the ceiling of the courtroom and required wiring which was taped to the courtroom wall. These fixtures were extremely distractive and also generated an inordinate amount of heat. The type of equipment employed to increase the lighting within the



courtroom gave the appearance of a Hollywood sound stage and it was ordered removed prior to trial. As an alternative the technical people suggested the use of a high intensity bulb which could be placed in the existing ceiling sockets and which would produce neither glare nor heat. Approximately ten to twelve such bulbs were utilized in both courtrooms and they were neither distracting nor uncomfortable. This also eliminated the unsightly wiring.

6. **Conferences of counsel.**

As previously mentioned, great care was taken by the camera operator to avoid picking up any audio portion of attorneys conferring at counsel table. Care was also taken to avoid audio pickup of bench conferences.

7. **Impermissible use of media material.**

Discussed in Court's recommendations. (See page 20).

8. **Appellate review.**

Pursuant to the provisions of paragraph (8.), it is this Court's understanding that a trial Court order is presently before the Supreme Court having been filed by Post-Newsweek Stations, Florida, Inc. The subject matters recited in that order are of genuine concern to both the media and the Court and it is respectfully suggested the Supreme Court consider entertaining the issues raised by that order.

**9. Evaluation of program.**

The issue sought to be resolved in this pilot program is whether or not access to the courts through the medium of electronic media is compatible with the orderly administration of justice.

As Mr. Justice Black observed in *Bridges v. California*. 314 U.S., at 260, 86 L.Ed.192, 62 S.Ct.190, 159 ALR 1346:

> ". . . free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

The question arises whether or not unfettered access to news becomes synonymous with unfettered dissemination. If the answer to this question is in the negative, the next query is where does the authority lie to decide what will be reported and what will not.

It would appear the answer to these questions lies equally between the inherent powers of the Court and the conscience of the media.

As an example, it would be unthinkable for a child of tender years who had been the victim of a rape to be repeatedly photographed on television or in the printed media and suffer the ridicule of her classmates and friends and equally unthinkable for a trial judge to permit it. The same would apply to the victim of any sexual assault or any case involving a child.

Likewise, it would be prejudicial to the orderly administration of justice to permit the photographing of a police undercover agent or confidential informant when such action could pose a threat to the individual's life or, in the alternative, impede the efforts of law enforcement. Rather than face these issues in a confrontation between the press and the courts, the better practice would appear the media itself establish an enforceable code of ethical conduct to be adhered to by all members of their profession not inconsistent with the code of conduct imposed upon judges and lawyers.

This is not to suggest that trial judges should abdicate their authority and allow the press free rein in determining what will be reported or disseminated nor, on the other hand, should judges shed their robes and assume the role of editor, director or producer. It has been shown that in either instance abuses have resulted.

Certainly the most flagrant abuse was the trial of Bruno Hauptman[1] in 1934. However, as Chief Justice Warren Burger points out in *Nebraska Press Association v. Stuart*. 96. S.Ct.2791 (1976) at 2798:

> "Criticism was directed at the 'carnival' atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession—including other judges—pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court."

[1] *Hauptman v. New Jersey*, 115 N.J. Law 412, 180 A.809, Cert.denied 296 U.S.649, 56 S.Ct.310 (1935)

More recently in the celebrated case of *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct.1507, 16 L.Ed.2d 600 (1966), Mr. Justice Clark cited several examples of actions that were not taken by the trial judge which amplified the prejudice arising from the publicity surrounding Dr. Sheppard's trial.

Justice Clark noted, inter alia, that the Sheppard jury was not sequestered thus exposing them to newspaper, radio and television coverage. The jurors were permitted to go their separate ways outside the courtroom without adequate directions from the trial judge not to read or listen to anything concerning the case. It was noted that the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. Justice Clark further noted that the numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinions from both cranks and friends. Prospective jurors also received anonymous letters that should have made the trial judge aware that the publicity seriously threatened the jurors' privacy.

Justice Clark agreed with the opinion of the Ohio Supreme Court that Dr. Sheppard's trial was conducted in the atmosphere of a "Roman Holiday", 165 Ohio St., at 294, 135 N.E.2d, at 342.

This Court was fully aware of the opinion in Sheppard v. Maxwell and took the necessary steps to avoid the problems that arose in that case. The jury was sequestered in a hotel where arrangements had been previously made to either remove or disconnect the television sets in the rooms occupied by the jurors.



The jurors were kept together during the course of the trial under the supervision of a bailiff and security personnel from the Public Safety Department. They were not permitted newspapers, magazines or radios. The jury was transported together from the courthouse to the hotel and from the hotel to the courthouse. At all times they were in the company of the bailiff and security personnel. The jurors dined together and precautions were taken to insure they did not discuss testimony or any facet of the case throughout the trial. A request from the jury made during the trial to view themselves on television with the sound turned off was denied by the Court.

Through the media liaison person, the Court instructed that no photographs of the jury be taken either entering or leaving the courthouse.

This admonition became necessary when some members of the foreign media attempted to photograph jurors and witnesses in the corridors leading to the courtroom.

The Court took the position that access to the actual trial proceedings in this pilot program was a major step in the media's favor. In exchange therefor, the media should refrain from having cameras and lights in the corridors for the purpose of photographing trial participants and eliciting interviews. In the Court's opinion what transpired in the courtroom is a factual account of the trial which is news, but what is elicited in the corridors takes on the color of editorial comment.

Further, lights and cameras in the corridors are disruptive to other courts in session and become most annoying to witnesses, jurors and some attorneys.

The Court's feeling was communicated to the media and after the first day of trial there was complete restraint exercised by all reporters from photographing or interviewing trial participants outside the courtroom.

The Courts primary concern throughout this experiment should be to avoid even the "probability that prejudice will result" and that the conduct of a trial with electronic media in the courtroom will not be "deemed inherently lacking in due process". See *Estes v. State of Texas*, 381, U.S.532, 85 S.Ct.1628, 14 L.Ed.2d, 543 (1965).

In reversing the conviction of Estes, the Supreme Court of the United States pointed out that there was an absence of any showing of prejudice. In Estes as well as Sheppard it was the trial judge's failure to give adequate instructions and admonitions as well as his failure to insulate the jury from reporters and photographers that caused the Court concern.

This concern is amplified by Mr. Justice Black's comment in *In re: Murchison*, 349 U.S.133,136, 75 S.Ct.623,625, 99 L.Ed.942 (1955) when he observed:

> " . . . our system of law has always endeavored to prevent even the *probability* of unfairness." (emphasis supplied)

The overwhelming obstacle to this pilot program lies in the United States Supreme Court's decision in Estes. It should be noted that the Estes opinion was authored by Mr. Justice Clark speaking for the majority. He was joined by his brothers Douglas, Goldberg, Harlan and Mr. Chief Justice Warren. Of these five only



the Chief Justice, together with Justices Clark, Douglas and Goldberg, were of the view that the televising of trials as well as taking still pictures in the courtroom was in and of itself prejudicial error requiring reversal.

Mr. Justice Harlan did not go that far. Although concurring in the majority opinion, Justice Harlan was careful to point out that the use of cameras in the courtroom should be judged under the circumstances surrounding Estes only.

In his concurring opinion he took great pains to point out:

> " . . . the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause."

Bearing in mind that Estes was decided June 7, 1965 (the trial having taken place in 1962), it is appropriate that we reevaluate the issue in the light of Justice Harlan's comments.

All of the Justices who concurred in the majority opinion of Estes have left the High Court. Of the four who dissented, three remain.

The day has indeed arrived when television is commonplace in our daily lives. Technical advances over the last ten years have made equipment less obtrusive and the majority of media personnel have come to view their role as the conscience of the community with greater responsibility.

It is appropriate to compare some of the specific criticisms made by Mr. Justice Clark in the Estes opinion to the case sub judice. Justice Clark made reference to the "telltale red lights" on the television cameras which would distract the jury. No such lights were present on the cameras used throughout the Zamora trial. Justice Clark felt the jurors' eyes would be fixed on the cameras rather than the witnesses. This Court took particular note of the jurors throughout the trial and such was not the case. Concern was expressed in Estes that jurors would be subject to seeing portions of the trial on television or hearing broadcast commentary. This was avoided in the instant trial as previously discussed.

Further concern was expressed that the presence of cameras would have an impact upon witnesses to the extent they would become demoralized and frightened or given to overstatement. Further concern was expressed that in the presence of cameras some witnesses would become "cocky" while other witnesses may suffer from faulty memory and the accuracy of their statements may be severely undermined. In this regard Justice Clark felt that the presence of the cameras could cause embarrassment to witnesses and impede the search for truth and cause a natural tendency toward overdramatization. He felt inquisitive strangers and "cranks" might approach witnesses on the street with



jibes, advice or demands for explanation of their testimony.

No such problems were apparent in Ronney Zamora's trial. This Court must concur with Mr. Justice Clark's concern regarding the possible violation of the rule against witnesses. The rule, of course, is discretionary but when invoked should not be violated. It is felt however the learned justice misplaced his concern when he directed it toward television and radio broadcasts. Trials of great public interest are not confined to the electronic media and are more often reported in greater detail on the printed page. The witness who would violate the rule by watching portions of a trial on television or listen to radio broadcasts is the same witness who would without hestitation devour every word in a newspaper article which he had been instructed not to read. Compliance with the rule is a matter of integrity on the part of the witness and if he violates the Court's instructions there are sufficient sanctions available to the trial judge to admonish him.

Mr. Justice Clark points out that television is particularly bad where the judge is elected and notes that such is the case in all but six states. He noted that it would be difficult for judges to remain oblivious to the pressures that the news media can bring both directly and through the shaping of public opinion.

This Court, with the deepest respect for Mr. Justice Clark, disagrees.

The judge's conduct in the course of a trial should not be screened from public scrutiny. This is especially true since the judicial branch of government is the only

bulwark that stands as a shield between the people and the executive sword. The public has a right to know whether a judge is decisive or indecisive, attentive or inattentive, courteous or rude, whether or not he can maintain control over the trial proceedings and if he appears learned or confused. To this extent it makes little difference whether the judge is observed by spectators in the courtroom or by spectators viewing television.

However, in light of this concern, this Court specifically requested that prior to the televised proceedings and intermittently throughout the telecast the station announcer caution the public that they were not to set their minds upon a determination of any issue for the reason that they were not seeing the trial in its entirety.

This admonition was also given because of Justice Clark's concern that the presence of cameras in the courtroom would have an adverse effect on the defendant. Neither the defendant nor his attorney exhibited any concern nor raised any objection to the presence of cameras in the Zamora trial.

Finally, Mr. Justice Clark addressed himself to the concern that telecasting may deprive an accused of effective counsel. He pointed out there would be distractions, intrusions into confidential attorney-client relationships and the temptation afforded by television to play to the public audience.

These concerns are real. However, as mentioned elsewhere in this report, care was taken to insure that no communications between attorney and client were broadcast or even recorded. There was never an intrusion into the attorney-client relationship.



The greater concern of an attorney sacrificing the interests of his client on the altar of counsel's personal ego is far more disturbing. But, here again, if such were the case appropriate safeguards have been built into the law for post-conviction relief. (See Florida Criminal Rule of Procedure 3.850.) In addition, such conduct on the part of an attorney would be so deplorable as to merit disciplinary proceedings by the bar and the Supreme Court.

The Estes case, which is published complete with pictures, shows the atmosphere prevailing in the courtroom was more in tune with a network television studio than a place of justice. These photographs depict not one but a battery of cameras, cables snaking across the courtroom floor and a crowd of reporters that would appear to be attending a press convention rather than a trial. All of these abuses were eliminated in this case not only by virtue of the Supreme Court order but by the excellent self-policing of the media personnel.

It is interesting to note that the Estes trial was viewed by an estimated 100,000 people according to Justice Clark; the worldwide coverage of the Zamora trial was probably viewed by several million.[2]

The conduct of the Zamora trial in this pilot experiment must be viewed as a success. This was due to the

[2]State of Florida v. Zamora was listed in T.V. Guide and local newspapers as a regularly scheduled program on WPBT (Channel 2). This trial took place during the Nielsen rating period (A. C. Nielsen Co.) and the results showed on a given evening the Zamora trial was viewed by more people than watched the Johnny Carson show during the same time period on WCKT (Channel 7) the NBC affiliate.

excellent cooperation of all press personnel involved and particularly Mr. Steve Tello who, as the Court-appointed liaison, coordinated media activities. This Court received additional assistance from Mr. Joe Averill, attorney for The Miami News, Mr. Jim Spaniola, attorney for The Miami Herald and Mr. Alan Milledge, attorney for WCKT-TV, Channel 7. Each of these attorneys conferred with the Court prior to the trial and made themselves available to explain the Supreme Court's order to all media personnel.

**Recommendations**

1. **Equipment and personnel.**

(a) No change recommended.

(b) In major trials such as Zamora it is suggested that two still camera operators be permitted to take photographs provided one camera person is taking black and white pictures and the other color.

(c) It is recommended the location of cameras be designated in the courtroom by the presiding trial judge rather than the chief judge of the circuit. In the Zamora trial the cameras were originally positioned directly behind counsel table and the camera microphone could pick up even the faintest whisper. This was changed on the Saturday preceding the trial by the presiding judge because the chief judge could not be located. In a circuit this size it would seem inappropriate to thrust the chief judge into the role of "assistant director" in charge of lights and cameras.



(d) In any trial of great public interest where many media personnel will be participating, it is recommended that a mandatory pretrial conference be held between the court and the press. At this conference a liaison person should be appointed to conduct all further communications between the media and the court.

2. **Sound and light criteria.**

(a) No change recommended.

(b) No change recommended.

(c) No change recommended.

3. **Location of equipment and personnel.**

(a) The same change is recommended here as in 1.(c) above.

There should be a separate room designated for television monitors and technical personnel. Permission should be granted to install telephone equipment at media expense in order not to have reporters using the telephone of judge's secretaries, bailiffs or court reporters. This procedure (except for telephones) was employed during the Zamora trial and both the press corps and the Court found such a facility to be not only very convenient, but more in keeping with the dignity and decorum expected in a Justice building. This room housed all the equipment and personnel without difficulty and the room was completely maintained by the technicians. The morning following the close of the trial the building superintendent had a crew available to clean the room, however the technical people had already removed their equipment, down to the last piece

of tape that secured the wires to the floor and walls, leaving the room in spotless condition.

(b) Again, the same change is recommended as in 1.(c) above.

(c) A specific place in the courtroom should be designated by the trial judge for all reporters in an area assigned to the "press". This permits all media personnel to be subject to directions of the bailiff or court liaison person and offers them an area of privacy where they may take notes undisturbed by surrounding spectators. This would also eliminate clashes between spectators and reporters over who has the right to sit where.

4. **Movement during proceedings.**

No change recommended.

5. **Courtroom light sources.**

This Court would again recommend the same change as in 1.(c) above.

6. **Conferences of counsel.**

No change recommended.

7. **Impermissible use of media material.**

It is the personal feeling of this Court that video tape and audio reproductions would be of great value to an appellate court in reviewing trial proceedings. The printed record standing alone does not indicate voice inflections, facial expressions, a witness's demeanor, the



demeanor of the trial judge or the conduct of counsel. It is recommended the Supreme Court reevaluate its prohibition against the use of film, video tape, still photographs and audio reproductions for the purpose of appellate review at the conclusion of this pilot program.

8. **Appellate review.**

It is respectfully recommended without comment the Supreme Court address the pending issues in the trial court order filed by Post-Newsweek Stations, Florida, Inc.

9. **Evaluation of program.**

It is not felt the Zamora trial is itself sufficient to make a final determination concerning the modification of Canon 3A(7). The Court realizes the impact of this report not only on this canon but Canon 35 of the American Bar Association as well. Therefore, in accordance with this paragraph, a final report will be submitted at the conclusion of the pilot program. It is further recommended that in any trial where television and still cameras will be present in the courtroom the trial judge order the jury sequestered if it be a jury trial. It is also recommended witnesses be given strong admonitions by the trial judge concerning their viewing of trial proceedings as well as their reading reports in the printed media.

Further, in each case covered by television and still cameras during this pilot program where there is a jury, the presiding judge should confer with the jurors at the conclusion of the trial, in camera, to elicit their comments and report them to the Supreme Court.

Finally, it is emphatically urged that strong disciplinary action be taken against any attorney or judge who solicits media coverage of a trial for personal or political motives.

Very respectfully submitted,

/s/ PAUL BAKER

PAUL BAKER
Circuit Judge
Eleventh Judicial Circuit
of Florida, Criminal Division



# Appendix

IN THE SUPREME COURT

OF FLORIDA

JANUARY TERM, A.D. 1977

TUESDAY, JUNE 14, 1977

CASE NO. 46,835

IN RE: PETITION OF

POST-NEWSWEEK STATIONS,

FLORIDA, INC., FOR CHANGE

IN CODE OF JUDICIAL CONDUCT.

**ORDER**

Pursuant to this Court's Supplemental Interlocutory Decision filed April 7, 1977, the parties of record in the cause have submitted proposed standards of conduct and technology to govern electronic media coverage of proceedings in the courts of Florida during the one year pilot program invoked by the Supplemental Interlocutory Decision. In addition to the proposed standards, the Court has received response to the Supplemental Interlocutory Decision filed on behalf of the Chief Judge of the Eleventh Judicial Circuit of Florida

and Sunbeam Television Corporation. The Court's conferee met with a special committee of the Circuit Judges' Conference, counsel of record and other interested parties on May 21, 1977, at which time equipment was demonstrated and implementation of standards was discussed. It was unanimously recommended at the conference on May 21, 1977, that inauguration of the pilot program be postponed until July 5, 1977, to accommodate the July 4th holiday.

In the response of the Chief Judge of the Eleventh Judicial Circuit of Florida, it was recommended that the pilot program be limited in geographic scope to each of two judicial circuits. We have considered this proposal and rejected it on the basis that it would too severely limit the experience which this Court seeks to gain from the pilot program in order to reach a reasoned decision on the merits of the proposed modification of Canon 3A(7).

In implementing the pilot program and applying the standards hereinafter enunciated, the authority of the presiding judge conferred by statute, rule or common law to control the conduct of proceedings before him shall in no wise be diminished. In this regard, the same rules of law applicable to inclusion or exclusion of the press or public at particular proceedings or during the testimony of particular witnesses shall apply to the electronic media and still photographers.

In consideration of the foregoing, the following standards of conduct and technology are hereby adopted to govern electronic media and still photography coverage of judicial proceedings in Florida during the one-year pilot program commencing at 12:01 a.m. on July 5, 1977, and ending at 11:59 p.m. on June 30, 1978.



1. **Equipment and personnel.**

(a) Not more than one portable television camera [film camera — 16 mm sound on film (self blimped) or video tape electronic camera], operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding.

In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. **Sound and light criteria.**

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Appendix A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.



3. **Location of equipment and personnel.**

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1. (c) above shall not be moved during the pendency of the proceeding.

4. **Movement during proceedings.**

News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

5. **Courtroom light sources.**

With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

6. **Conferences of counsel.**

To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

7. **Impermissible use of media material.**

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of the pilot program shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.



8. **Appellate review.**

So that the Court may evaluate in depth all experiences engendered under the program at the end of one year, and to preclude appellate activity during the test year, (1) no appellate review shall be available to the electronic or still photographic media from individual orders entered by trial or appellate courts ruling upon matters arising under these standards, and (2) no appellate court shall entertain any petition by the electronic or still photographic media for extraordinary writ seeking in any way to affect such media reporting of a judicial proceeding or proceedings; provided however, that any party to this proceeding, any electronic media representative or any circuit or district court chief judge may at any time during the one-year pilot program apply to this Court, with proper notice to all parties, to amend the standards set out in this Order for the purpose of meeting unforeseen technical difficulties in their general application.

9. **Evaluation of program.**

At the conclusion of the one-year pilot program, all media participants in the program, all parties hereto, and all participating judges are requested to furnish to the Court a report of their experience under the program, so that the Court can determine whether or to what extent Canon 3A(7) shall be modified.

It is so ordered.

OVERTON, C.J., ADKINS, BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., Concur KARL, J., Concurs specially with an opinion

A True Copy

TEST:

/s/ Sid J. White
Sid J. White
Clerk Supreme Court.

KARL, J., Concurring Specially.

I concur with the majority in establishing the one-year pilot program and adopting standards of conduct and technology to govern the electronic media and still photography coverage of judicial proceedings in Florida, but I would establish far less restrictive standards.

The justification for standards is the potential for distracting noises and movements and the possibility that the electronic media reporters will have an effect on the outcome of the trials by concentrating on certain witnesses and excluding others. These are legitimate concerns, and every effort should be made to avoid any activity in the courtroom that interferes with the litigants' rights to fair trials. However, the standards promulgated by the majority go further than necessary.



PAGE 1

FILM CAMERAS — 16mm Sound on Film (self blimped)

| | | |
|---|---|---|
| 1. CINEMA PRODUCTS | CP-16A-R | Sound Camera |
| 2. ARRIFLEX | 16mm-16BL Model | Sound Camera |
| 3. FREZZOLINI | 16mm (LW16) | Sound on Film Camera |
| 4. AURICON | "Cini-Voice" | Sound Camera |
| 5. AURICON | "Pro-600" | Sound Camera |
| 6. GENERAL CAMERA | SS III | Sound Camera |
| 7. ECLAIR | Model ACL | Sound Camera |
| 8. GENERAL CAMERA | DGX | Sound Camera |
| 9. WILCAM REFLEX | 16mm | Sound Camera |

PAGE 2

VIDEO TAPE ELECTRONIC CAMERAS

| | |
|---|---|
| 1. Ikegami | HL-77 HL-33 HL-35 HL-34 HL-51 |
| 2. RCA | TK 76 |
| 3. Sony | DXC-1600 Trinicon |
| 3a. ASACA | ACC-2006 |
| 4. Hitachi | SK 80 SK 90 |
| 5. Hitachi | FP-3030 |
| 6. Philips | LDK-25 |
| 7. Sony BVP-200 | ENG Camera |
| 8. Fernseh | Video Camera |
| 9. JVC-8800 u | ENG Camera |
| 10. AKAI | CVC-150 VTS-150 |
| 11. Panasonic | WV-3085 NV-3085 |
| 12. JVC | GC-4800u |

## VIDEO TAPE RECORDERS/used with video cameras

| | | |
|---|---|---|
| 1. | Ikegami | 3800 |
| 2. | Sony | 3800 |
| 3. | Sony | BVU-100 |
| 4. | Ampex | Video Recorder |
| 5. | Panasonic | 1 inch Video Recorder |
| 6. | JVC | 4400 |
| 7. | Sony | 3800H |

Judge Thomas E. Sholts,
Report to the Supreme
Court of Florida re:
Conduct of Audio-Visual
Trial Coverage

IN THE CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA
CRIMINAL DIVISION

Thomas E. Sholts, Judge

Case No. 77-1236 CF

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STATE OF FLORIDA

v.

MARK A. HERMAN

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# Report to
# The Supreme Court of Florida
# re
# Conduct of
# Audio-Visual Trial Coverage

Pursuant to paragraph (9) of the opinion of the Supreme Court of Florida in re: Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla. 1977), this Court submits its report concerning media coverage in the trial of State of Florida v. Mark A. Herman (Circuit Court Case No. 77-1236 CF).

HISTORY

Judicial Canon 3A(7) (formerly known as Canon 35) originated from a 1932 ABA resolution which suggested a complete ban (to prevent breaches of judicial decorum) on radio broadcasting and the taking of still photographs of judicial proceedings. Its complete history is attached as an Appendix to Justice Harlan's concurring opinion in Estes v. Texas, 381 U.S. 532 (1965). The Canon's adoption was related to excessive and spectacular media coverage of the Lindbergh kidnapping trial in State v. Hauptmann, 180 A. 809 (N.J. 1935), cert. denied 296 U.S. 649 (1935). Canon 35 was formally adopted by the ABA House of Delegates in 1937 and amended in 1952 to ban the televising of court proceedings.

Rule 3.110, Florida Rules of Criminal Procedure, presently bans broadcasting, photographing, televising and taping of criminal judicial proceedings. Florida Experimental Rule 3A(7) was taken from ABA Canon 35 and temporarily supersedes Rule 3.110.

On January 24, 1975, Post-Newsweek Stations, Florida, Inc. filed a petition for modification of Rule 3A(7) to permit use of

radio broadcasting equipment and television cameras in Florida judicial proceedings. By order entered January 28, 1976, the Florida Supreme Court permitted television coverage on a restricted basis of one criminal trial and one civil trial in the Second Judicial Circuit. Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976). Consent of jurors, witnesses and parties was required. Any camera film was to be filed with the Florida Supreme Court and could not, without prior approval, be shown for public broadcast. On April 12, 1976, by interlocutory order, still photography cameras were also included.

The Second Judicial Circuit authorization was expanded (due to difficulty in obtaining agreement of all involved persons) to include the Ninth Judicial Circuit. Petition of Post-Newsweek Stations, Florida, Inc., 337 So.2d 804 (Fla. 1976). On December 21, 1976, a supplementary order granted similar authorization to the Fourth and Eighth Judicial Circuits. Having no success in obtaining all parties' consent, the Florida Supreme Court decided an involuntary experimental program was essential to a reasoned decision and, in effect, did away with the consent portion of its former order when it stated:

> "Consequently, in order to gain the experience which we deem essential to a proper final determination of this cause, it is the decision of this Court to invoke a pilot program with a duration of one year from July 1, 1977, during which the electronic media, including still photography, may televise and photograph, at their discretion, judicial proceedings,

> civil, criminal, and appellate, in all courts of the State of Florida, subject only to the prior adoption of standards with respect to types of equipment, lighting and noise levels, camera placement, and audio pickup, and to the reasonable orders and direction of the presiding judge in any such proceedings. Post-Newsweek Stations, Florida, Inc., 347 So.2d 402, 403 (Fla. 1977).

The starting date was subsequently changed from July 1, 1977, to July 5, 1977, at 12:01 a.m. ending at 11:59 p.m. June 30, 1978. A motion to extend the pilot program for an additional year was recently denied on May 11, 1978. The Florida Bar's Board of Governors on the same day, by resolution (21 in favor-8 against), instructed its counsel to oppose any effort to continue the experimental pilot program.

On June 14, 1977, the Florida Supreme Court in Post-Newsweek Stations, Florida, Inc., supra, p. 404, established standards and criteria for use of cameras and electronic recording devices in Florida's courtrooms. Operation of the cameras was subject to strict standards, and the media had no right of appeal from restrictive trial court orders during the pilot program. The standards related to: equipment and personnel; sound and light criteria; location of equipment and personnel; movement during proceedings; courtroom light sources; conferences of counsel; impermissible use of media material; appellate review; and evaluation of the program. The Florida Supreme Court also limited the number of camera and audio system operators in trial proceedings to:

a. One camera person operating not more than one television camera.

b. One photographer operating not more than two still cameras.

c. One audio system for radio broadcast.

The court also designated brands and models of cameras for courtroom use. The chief judge of each circuit was given responsibility to designate appropriate courtroom areas for placement of equipment.

During the past year, Florida's Experimental Rule has not proceeded unchallenged:

a. One criminal defendant sought a Federal Court injunction of the Experimental Rule.

b. Two criminal defendants requested the Florida Supreme Court ban cameras in trial proceedings.

c. One witness in a criminal case requested the Florida Supreme Court prohibit televising her testimony.

d. An attempt was made to bar televising the testimony of a sixteen-year-old rape victim.

Each challenge was rejected. See Briklod v. State, Fla. Sup. Ct., No. 52,499; Briklod v. Rivkind, S.D. Fla., No. 77-2148-Civ-JLK, opinion filed July 20, 1977; Wilhoit v. State, 351 So. So.2d 409 (Fla. 1977); State v. Granger, 352 So.2d 175 (Fla. 1977); State v. Bannister, ____So.2d____ (2DCA Fla. 1978), No. 78-376, opinion filed March 10, 1978; Kreusler v. Sholts, ____ So.2d____, No. 53,348; Kreusler v. Sholts, S.D. Fla., No. 78-8039 Civ-CF.

The last two mentioned cases concern this report because they arose when the widow of the deceased murder victim in the Herman trial objected to televising her testimony upon a claimed right to privacy under authority of the 9th and 14th Amendments to the U. S. Constitution and Article I, §1, Florida Constitution 1968. She sought injunctive relief in the Federal District Court and a direct Writ of Prohibition in the Florida Supreme Court. Her claims were dismissed in both instances.

The lead federal case regarding the media's presence in the courtroom is Estes, supra, although Estes was not the first case in which the United States Supreme Court addressed the issue of cameras in the courtroom. Stroble v. California, 343 U.S. 181 (1952). Most recently, both Estes and Stroble were referred to in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). See also Sheppard v. Maxwell, 384 U.S. 333 (1966) and Murphy vs. Florida, 421 U.S. 794 (1975).

An analysis of the Florida decisions as well as those of various federal and state courts is found in Attorney General Shevin's written presentation of April 8, 1978, to the American Bar Association's standing Committee on Standards for Criminal Justice.

STATE OF FLORIDA V. MARK A. HERMAN

The Herman trial was televised gavel-to-gavel by WPBT-Channel 2 (Public Broadcasting System). The proceedings were

extensively reported in most major newspapers published in Southeastern Florida, usually accompanied by still camera courtroom photographs. There was no separate radio broadcasting system installed, although a facility for audio pickup was made available by WPBT-Channel 2.

At 9:00 a.m., Monday, February 6, 1978, the trial began. Pooling arrangements for media personnel were made in advance of the trial. The court appointed Mr. R. L. Horey, Court Administrator of the Fifteenth Judicial Circuit, to serve as liaison between the media and the court. Media personnel did not attempt to bypass the court's liaison officer, and all media personnel cooperated with the court in carrying out suggestions and requests.

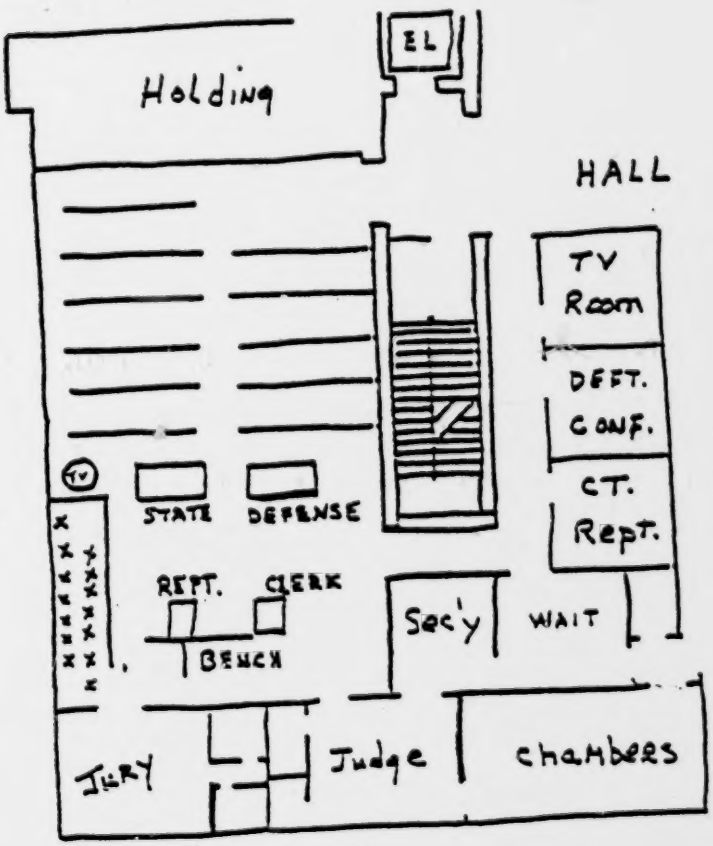
One portable television camera was used throughout the trial. The camera was operated by personnel of WPBT-Channel 2. Only one camera person manned the camera at any given time. Substitution of camera operators was done during recesses so as not to disrupt the proceedings. The court requested all microphones, including the directional microphone located on the camera, be turned off when panning counsel tables and side-bar conferences.

A room immediately adjacent to the courtroom was reserved for personnel and equipment for video and audio tape reproduction. Thus, the halls immediately outside the courtro

were not unduly congested nor were other courts in session overly disturbed by this activity.

The courtroom was not remodeled to accommodate television equipment, but additional microphones, necessary cable equipment, the television camera and required video tape reproduction equipment were installed over the weekend before the trial. The court met with media representatives on Sunday afternoon, February 5, 1978, to finally inspect and approve the installation and equipment.

The television camera was mounted on a fixed tripod base located directly to the rear of the jury box.



The camera and cables were relatively unobtrusive, but because of the configuration of the courtroom and the location of existing benches, counsel tables and seating arrangements, the camera was located much too close to the jury box.

The television and audio equipment caused no significant distractions. The trial was televised without resort to artificial lighting. Existing courtroom light was sufficient without increasing light intensity. The courtroom's air conditioning equipment caused some interference with the audio portion of the televised signal. This problem was somewhat remedied by adding, at the request of Channel 2, two microphones--one located at the bench and the other at the witness stand.

On several occasions, before and after normal court hours, the court held informal conferences with Mr. Thomas N. Donaldson, Producer/Director of WPBT, concerning such matters as the length of a given day's session and particularly with respect to the two Saturday sessions which were televised "live" rather than video tape rebroadcast. For that, it was necessary to install additional equipment (a microwave transmitter) on the courthouse roof. Arrangements were made well in advance to satisfactorily complete this work. Channel 2 personnel and the building maintenance staff of the Palm Beach County Courthouse cooperated well in installing and setting up all necessary additional equipment.

The court permitted one photographer utilizing two still cameras (with not more than two lenses for each camera) to take still photographs. These still cameras partially conformed to specifications set forth by the Florida Supreme Court. In July, 1977, the Chief Judge of this Circuit generally approved the Leica M-2, Nikon F-2 and Leica M-4-2, cameras ultimately used at the Herman trial.

A special seat was indicated for the still camera photographer who was not permitted to move about the courtroom. The news media agreed between themselves as to which still photographer would take pictures on any given day.

During the first three days of trial, the court noticed some movement by the still camera photographer (from one side of the aisle to the other) when taking pictures. As soon as the matter was brought to the photographer's attention, the movement stopped and there was no further problem. In comparison the clicking of the still photographer's camera shutter was more disruptive than the presence of the television camera. Although the court imposed no restriction on the number of still camera shots permitted, it now seems reasonable to minimize this distraction by setting a limit on the number of still camera shots taken of each witness.

The front row of public benches were reserved for media personnel which included representatives from local newspapers,

radio and television stations, and employees of the Public Broadcasting System. The court requested media personnel refrain from interviewing, photographing or conducting any activity in the hallway immediately outside the courtroom because of possible interference with the free flow of spectators, parties, attorneys, witnesses and jurors to the courtroom.

During the first week of trial, and contrary to the court's directive, a local television station (not WPBT-Channel 2) took mini-camera television shots in the hall immediately outside the courtroom. Interestingly, the court received a formal complaint about this activity from other media personnel and immediately rectified the problem by speaking with the offenders.

Thus, it must be fairly stated that the experiment of fully televising the Herman trial worked out much better than the court believed possible.

## EVALUATION AND RECOMMENDATIONS

There were no histronics and no thespians, although the danger of acting for the camera will always exist. The attorneys witnesses and all interested parties were properly behaved. One witness refused to testify from fear of her safety, partially contributed to by the television's presence. The court rejected

the witness' position and held her in contempt.

The defendant objected to televising the trial on due process grounds. The court overruled his objections because of the Supreme Court's ruling temporarily suspending FRCrP 3.110. The State originally took no position either for or against televising the trial, although subsequent to the verdict, the prosecutor stated an objection on security grounds because of possible retribution against several prison inmate witnesses who testified for the State and who might not otherwise have been identified to fellow inmates except for exposure on television.

Because of excessive pretrial publicity and Channel 2's decision to televise the trial, the court decided to sequester the jury. The defendant requested the court sequester the witnesses as well. The court denied this request because there were approximately fifty named witnesses, and it was unreasonable and economically unfeasible to grant defendant's request. However, when the court invoked the witness rule, each witness was specifically directed not to watch television proceedings nor listen to radio news broadcasts, nor read any newspaper headlines or accounts concerning the trial. The inmate witnesses (housed at the Palm Beach County Jail) were not permitted to listen to any radio or television broadcasts, nor read any

newspaper accounts of the trial. This procedure was arranged and agreed to by the parties and enforced by court order.

Because of the defendant's motion to change venue (generated by excessive pretrial publicity and contributed to by Channel 2's decision to fully televise the trial), the court followed a pre-qualifying voir dire procedure by examining each juror individually away from the remainder of the jury panel and outside the presence of the television camera, although newspaper reporters and a still camera photographer were permitted to be present.

Four general areas were discussed with each juror:

a. Pretrial media publicity (most of which dealt with the defendant's extensive criminal record).

b. Juror attitudes toward television and other media coverage of the trial.

c. Jury sequestration and length of the trial (estimated at three weeks).

d. Capital punishment.

The pre-qualification process was lengthy but necessary. The court was afraid the answers of individual jurors on such sensitive matters, if made within earshot of the entire panel, might prejudice other prospective jurors by causing the formation of opinions leading to disqualification.

A panel of eighty-three jurors was individually interviewed. Thirty-five were excused for cause. Forty-eight were pre-qualified after which the voir dire examination moved from chambers to the courtroom.

The pre-qualifying procedure lasted four complete working days. The voir dire proceedings held in the courtroom took one working day. Of the thirty-five jurors discharged, fourteen were excused because of pre-conceived opinions formed by pretrial publicity; the others were excused because of attitudes about capital punishment or for hardship reasons.

The great majority of jurors interviewed during voir dire stated they preferred not to have the trial televised but would nevertheless be able to render a fair and impartial verdict. Only a few thought the idea of televising the trial and taking still photographs in the courtroom good. By the end of the trial, the sitting jurors apparently changed their views about the media's presence in the courtroom. The court, with agreement of the parties, requested each trial juror to voluntarily complete a jury survey form provided by the Department of Communication of Florida Technological University which is currently making a study of the impact of the media on courtroom proceedings. The court also asked interested courtroom personnel to fill out the same form. A synopsis of the information received as well as a sample of the survey form is attached.

The jury of twelve persons and two alternates was selected on Friday, February 10, 1978, and instructed to return home, pack belongings, and return to court on Saturday morning, February 11, 1978, when the jury was sworn and testimony began. Meanwhile, arrangements were made to lodge the jury at a local

motel whose management had been instructed to remove all television and radio sets from jurors' rooms. Sequestration was absolutely necessary to protect the record by making it impossible for jurors to watch proffers of evidence and other related matters not normally seen by the jury. The court would not have sequestered this jury except for the presence of the media in the courtroom. The expense of sequestration borne by the taxpayers of Palm Beach County (not the media) amounted to approximately $11,500 including hotel rooms, meals, overtime for round-the-clock bailiffs and jury transportation.

The verdict was rendered February 22, 1978. During the trial and directly related to the widespread public interest caused by the television coverage, the court received two bomb threats on its direct telephone line. Additionally, courthouse personnel received four other bomb threats telephoned to other departments in the courthouse. The court also received three or four other telephone messages pertaining to so-called "leads" in the case. The anonymous bomb threats necessitated several security searches of the courtroom and adjacent areas, and the "leads" necessitated investigation by the State Attorney's office and defense counsel. The bomb threats and "leads" were kept from public knowledge for security reasons.

I believe all previous objections to the media's presence in the courtroom on grounds the equipment utilized creates a

theatrical appearance no longer has merit, although to minimize the possibility of distraction and prejudice, courtrooms should be remodeled to include a booth for media personnel and equipment. The portable television camera was compact and relatively unobtrusive. As previously noted, the proceedings were more disrupted by the clicking shutter of the still photographer's camera which was most noticeable during the pre-qualifying voir dire proceedings but obvious as well in the courtroom. There were no Kleig lights present and care was taken to hide television cables. The transmitting truck was parked on the public sidewalk immediately adjacent to the northwest door of the courthouse. Necessary cables from the truck were strung through the stairwell to the fourth floor courtroom. The cables were visible but care was taken to protect the safety of persons using the stairs.

The media claims the right to take still photographs, to tape and broadcast testimony and to televise trials because it wishes to educate the public. I doubt the intellectual integrity of the media's position in making its request to change Canon 3A(7). To my knowledge, no civil proceeding has been fully televised in Florida during the one-year experimental period. The reported challenges to the proposed amended rule pertain only to criminal cases, particularly those dealing with lurid murder and sex offenses. As Mr. Herb Sites,

an editorial writer for the Palm Beach Times, amply pointed out March 6, 1978:

> "I do have doubts, though, of the value of TV trial coverage as an educational aid to the public. True, in the Herman trial airing, many people saw for the first time how a murder case is actually conducted. This one had some of the elements of the more lurid TV dramatizations viewers have been fed in the past. But it could hardly be considered a fair sample of the day-to-day operation of our courts of justice.
>
> Perhaps 90 per cent of our normal court proceedings are deadly dull. No rating-hungry TV station or network would dare make them daily fare for their viewers. It is logical to assume that even if the court camera ban is permanently removed, TV coverage would be offered only on the most sensational trials. And that would provide more 'Roman circuses' than education."

When a defendant's problems become entertainment for the public, the trial takes on a different form than an orderly search for the truth. The chief function of our judicial trial machinery is to ascertain the truth. The use of television does not materially contribute to this objective. Its use amounts to injection of irrelevant factors into court proceedings. Trials are open to the public if the public desires to attend. Permitting the media to televise trials and take still camera photographs during courtroom proceedings creates unnecessary problems at the risk of great possible prejudice. As previously noted, the adoption of Canon 35 was directly related to media excesses in the Hauptmann case, supra. Those excesses have happened in many other reported

cases, and there is no reason to believe the media's behavior will improve in the future. The gathering of sensitive news is dependent upon strong pressure to "get the scoop" or "beat the competition", and therein lies the problem. The zeal of competition will cause repetition of past excessive behavior. After the trial, the media asked the court about its opinion concerning the cameras' presence in the courtroom. When the court indicated it did not favor televising trials, the media's response was publication of the attached caricature.

I am opposed to televising criminal trials for the reasons noted in Estes v. Texas, supra, as well as others:

1. The potential impact of television on jurors is significant. As soon as the public knows a case will be fully televised, it becomes a "cause celebre". The entire community (including prospective jurors) becomes interested in all morbid details about the matter. As happened in the Herman case, the trial immediately assumes an immensely important status in the press, and the accused is highly publicized along with the gory details of the offense. Realistically, it is only the notorious trial which will be fully broadcast. The conscious or unconscious effect this may have on any given juror's judgment is questionable, but experience indicates it is not only possible but highly probable it will have a direct bearing on a juror's vote. Where pretrial publicity creates

Post Times March 1, 1978 — Letters to the Editor

intense public feeling, aggravated by telecasting of a trial, the televised jurors cannot help but feel the pressures of knowing that friends, neighbors and the public are watching. I believe jurors may very well be distracted by the presence of the television camera because jurors are aware of the fact of telecasting, and to some extent most people are self-conscious when being televised.

2. The quality of testimony in criminal trials may be impaired. The impact upon a witness who knows he or she is being viewed via television by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement, memories may falter, accuracy of testimony may be severely undermined and embarrassment may impede the search for the truth as may a natural tendency of over-dramatization.

3. Invocation of the witness rule is frustrated. Unless the witnesses are sequestered, they are able to view broadcasts of the day's trial proceedings, notwithstanding an admonition not to do so. They can view and hear the testimony of proceedings and other witnesses and so shape their testimony as to make its impact crucial. Also, the mere fact the trial is televised may render witnesses reluctant to appear and testify, thereby impeding the trial.

4. Additional responsibilities are directly placed upon

the trial judge. He or she has the responsibility of maintaining the integrity of the trial, protecting the due process rights of the participants and making sure the accused receives a fair trial. When television and still camera photographers come into the courtroom, the judge must also supervise that presence and spend a great deal of time on unwarranted ancillary matters.

5. The impact of courtroom television on a defendant is extremely important. The inevitable closeups of his or her gestures and expressions may overcome personal sensibilities, dignity and the ability to concentrate--sometimes the difference between life and death. A defendant is entitled to his or her day in court which should not become a television sound stage or a movie set.

The television camera is a powerful weapon. Its coverage must from technological and fiscal necessity be selective--that is, edited. Total television coverage of all trials all the time is technically possible but economically impossible. Editing is therefore essential and inevitable, and the editing is the prerogative of the media. Editing is difficult without value judgment. No mechanics presently exist for media portrayal of the value judgments of the judicial system independent of the value judgment of the media. The power to portray certain trials or certain portions while not portraying

other trials or other portions is the power to distort the effects of the administration of justice. Unintentionally or otherwise, there is the potential of destroying a defendant and his or her case in the eyes of the public. As previously mentioned, the camera invariably focuses upon the unpopular or infamous accused. Obviously, public sentiment can affect trial participants, and the real unknown is the possibility of prejudice to criminal defendants in such instances.

6. Because of excessive pretrial publicity and the media's presence in the courtroom, the voir dire process takes much longer which unnecessarily prolongs the trial.

7. An important State's witness in the Herman trial was granted a change of venue in his subsequent trial for first degree murder based upon excessive pretrial publicity, attributable to his television exposure.

8. Counsel for the co-defendant of Ronny A. Zamora received permission to voir dire Grand Jurors who would be considering an amended indictment for murder because the original indictment had been dismissed on technical grounds. This situation presents a case of first impression in Florida, directly attributable to the television coverage of the Zamora trial and opens a Pandora's box of new problems for the court.

9. Gavel-to-gavel television coverage is expensive. As

previously noted, jury sequestration in the Herman trial cost the taxpayers approximately $11,500. This cost should properly be borne by the media and not by the taxpayers of Palm Beach County.

10. The presence of the media in the courtroom unnecessarily gives each defendant another ground for reversal should there be a conviction, which adds additional burdens to an already clogged and overworked appellate court system.

I therefore recommend that Canon 3A(7) and FRCrP 3.110 not be amended.

If the Supreme Court decides to amend the Canon and rule, I then recommend:

a. No amendment unless and until further studies are made to determine whether or not the presence of television and still photography cameras is prejudicial to defendants in criminal cases.

b. Strict regulation of the media be imposed.

c. The Supreme Court require the media pay all reasonable costs necessarily incurred as a result of its presence in the courtroom, which should include remodeling alterations, jury and witness sequestration expenses, salary charges for overtime of bailiffs and court personnel and related charges.

d. The Supreme Court grant the trial court judge full and complete discretion to deal with particular problems on a case-to-case basis.

Respectfully submitted,

Thomas E. Sholts

# OPINION SURVEY

This research project is being conducted by the Department of Communication of Florida Technological University, in cooperation with the court. Our purpose is to secure information which will, hopefully, help us improve our court system. We are asking you to please fill out the following questionnaire. Your cooperation is voluntary and not in any way required by the court. We do deeply appreciate your time and effort. We do not need your name so do not sign this form; we respect your right to privacy.

DATE: _____

Check the Appropriate Box

[9] Female [9] Male

Age: [ ] Under 20 [4] 21-31 [2] 31-40 [III] over 40

1. I participated in this trial in the following way:

| | |
|---|---|
| [I] Judge | [ ] Defendant |
| [ ] Defense Attorney | [2] Spectator |
| [I] Prosecuting Attorney | [I] Court Reporter |
| [ ] Witness for the Defense | [2] Bailiff |
| [ ] Witness for the Prosecution | [ ] Court Clerk |
| [III] Juror | |

2. I <u>was</u> [16] <u>was not</u> [2] aware before coming to this trial that television and still cameras were going to be permitted in the courtroom.

   <u>NOTE</u>: For the following statements, check the point on the scale over the words which best describe how you feel about the statement. Indicate your feelings for both the television and still cameras.

3. As a participant or observer in this trial, I found the presence and use of the television and still cameras to be very distractive. (One juror said clicking noise was distracting, and one of the court personnel remarked about the "loud shutter".)

| | | | | | |
|---|---|---|---|---|---|
| Television Camera: | | 2 | 1 | 8 | 7 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
| Still Camera: | 2 | 2 | 2 | 9 | 3 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |

4. As a participant or observer in this trial, I believe the presence and use of the television and still cameras to be fair to the defendant.

| | | | | | |
|---|---|---|---|---|---|
| Television Camera: | 5 | 4 | 6 | 2 | 1 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
| Still Camera: | 4 | 6 | 6 | 1 | 1 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |

5. As a participant or observer in this trial, I believe the presence and use of the television and still cameras to be fair to the witnesses.

| | | | | | |
|---|---|---|---|---|---|
| Television Camera: | 5 | 4 | 4 | 2 | 3 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
| Still Camera: | 5 | 3 | 5 | 2 | 3 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |

6. As a participant or observer in this trial, I believe the presence and use of the television and still cameras interfer with the conduct of the trial.

| | | | | | |
|---|---|---|---|---|---|
| Television Camera: | | 3 | 1 | 9 | 5 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
| Still Camera: | | 2 | 4 | 9 | 3 |
| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |

7. As a participant or observer in this trial, I believe the presence and use of the television and still cameras in the courtroom are in the best interest of the public.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | 5 | 5 | 1 | 4 | 3 |
| Still Camera: | 4 | 8 | 3 | 1 | 2 |

8. As a participant or observer in this trial, I found the presence and use of the television and still cameras in the courtroom made me feel tense.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | | 3 | | 11 | 4 |
| Still Camera: | | 3 | 1 | 9 | 5 |

9. In my opinion the presence and use of the television and still cameras in the courtroom is a desirable practice.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | 3 | 6 | 4 | 3 | 2 |
| Still Camera: | 3 | 8 | 4 | 2 | 1 |

10. In my opinion, the presence and use of television and still cameras in the courtroom inhibited the testimony of witnesses.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | 2 | 2 | 3 | 7 | 4 |
| Still Camera: | 1 | 3 | 3 | 8 | 3 |

11. In my opinion the presence and use of television and still cameras in this trial had an intimidating effect on the judge.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | | | 1 | 7 | 10 |
| Still Camera: | | | 1 | 7 | 10 |

12. In my opinion the presence and use of television and still cameras in this trial did not affect the courtroom behavior of the attorneys in any way.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | 4 | 7 | 3 | 4 | |
| Still Camera: | 5 | 8 | 2 | 3 | |

13. In my opinion, the presence and use of television and still cameras in the courtroom in this trial caused the jurors to be distracted.

| | Strongly Agree | Agree | Uncertain | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Television Camera: | | 1 | 4 | 8 | 5 |
| Still Camera: | | 4 | 4 | 5 | 5 |

NOTE: Please place additional comments below.

☒ Check here if you have had previous experience with television or still cameras in the courtroom.

Additional Comments:

1. "I felt that the camera overemphasized the role of the attorneys in the trial and gave too little weight to the evidence. Human beings catch the eye of the TV viewers more than a piece of evidence. This tends to make the best speaker the winning attorney in the estimation of the audience. This is the opinion of most of my friends.

"As a juror I felt the witnesses, lawyers and jurors were ever aware of the presence of the camera and at times reacted just for TV."

2. "I feel that a trial that is televised in its entirety tends to be misleading to the public. Despite warnings, the public still bases its opinion on what it saw and heard and closes the mind as to what the jury saw and heard."

3. "I can only speak for myself--I heard no juror say they were distracted by the television camera. I feel if I were a witness it would bother me because I am basically a shy person and don't like to be on display or the focus of everyone's attention. I feel the general public is interested in seeing the real thing rather than just reading about it in the papers. But I personally never watched any of the Ronny Zamora trial.

"I can't really say from my own experience if it's right or wrong, good or bad. I'm sure I'd have a definite opinion if I or a member of my family, or a friend were directly involved. Then I probably wouldn't like it."

THOMAS E. SHOLTS
JUDGE
THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

COUNTY COURT HOUSE
WEST PALM BEACH, FLORIDA 33401

June 14, 1978

JUN 19 1978
SUPREME COURT

Ack-
Distribute
To all
Justices
except
CJ.

Honorable Ben F. Overton
Chief Justice
The Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

Dear Justice Overton:

Pursuant to the Supreme Court's decision in Post-Newsweek Stations, Florida, Inc., 347 So.2d 402, I enclose 14 copies (2 for each Justice) of my report concerning the Audio-Visual Trial Coverage of the State of Florida v. Mark A. Herman.

Being an active participant in a fully televised trial was very interesting and most challenging, but I sincerely believe the proposed amendment of Canon 3A(7) will have a long-range dilatorious effect on the administration of justice at the trial court level.

Warm regards,

Thomas E. Sholts

TES:js
Enc.

Judge Marvin Mounts, Jr.
Report to the Supreme
Court of Florida Concerning
Audio-Visual Trial Converage

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA IN AND
FOR PALM BEACH COUNTY

CRIMINAL DIVISION

| | | |
|---|---|---|
| STATE OF FLORIDA | ) | CASE NO. 77-1675 CF |
| | ) | |
| vs. | ) | |
| | ) | |
| NOLLIE LEE MARTIN, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

REPORT TO THE SUPREME COURT OF FLORIDA
CONCERNING AUDIO VISUAL TRIAL COVERAGE

I am in basic agreement with the thoughts and recommendations forwarded to you by Judge Thomas Sholts in his case numbered 77-1236 CF, State of Florida versus Mark A. Herman. My courtroom adjoins Judge Sholts' and I followed that trial.

At the outset, this report reflects my opinion: I have no direct and positive evidence beyond what I think.

Because of my concurrence in Judge Sholts' report, my report covers only some special observations of mine.

The first phase of the Martin case began on Monday, April 17th, 1978 and concluded with a verdict on Friday, April 28th, 1978.

The second stage occurred May 15th, 1978. Portions of the pre-trial motions and almost all of the first trial were video taped. To my knowledge, there was no live television broadcasting; the tapes were edited and broadcast during news reports by the television stations. There was no television coverage of the second stage of the trial. Still cameras operated throughout all stages of pre-trial motions and both trials.

The media were cooperative in all respects and their behavior was commendable.

I asked all participants in the case to share their thoughts with me. I have included the letters of those that chose to do so with this report. No jurors responded.

It is noteworthy that one of the letters reflects that the local Association of Psychiatrists has taken a position against the use of television cameras in the courtroom.

Although I am aware that a number of people have indicated that the use of television cameras does not affect them while in Court, I must admit that both television and still cameras have always made me slightly nervous. I am aware of them and have never been able to overcome my uncomfortable state when I feel that I am the object of their truthful lenses.

I do believe that when an entire trial is broadcast (such as was done by the educational channel in Miami) that that is a worthwhile process for citizens.

While there is much to be said for the educational aspect of the process, television is and continues to be an entertainment medium in its commercial sense; we all know that the matter of the ratings is of the highest consequence in the industry. I also feel commercial television will cover only the sensational trials.

While I have no empirical evidence to demonstrate my belief, it has always seemed to me that prosecutors attempt to persuade a jury to identify with the community and the need of the community to protect itself from criminal conduct. To the extent that a juror feels that his friends, neighbors and business associates have identified him as a person who will decide an important criminal case, I feel that it must certainly be a most difficult influence for him to filter out of his mind as he or she concentrates on the need for objectivity. This concern must, however, be balanced against the impressive argument made by the media representatives in this case that jurors in a small or rural community may know everyone involved in the case before they are selected and sworn. It may very well be true that jurors can and will do their best to overcome improper thoug and influences as they plug into the task of doing justice between

the two competing sides. The difficulty is that we do not know the answers to these questions at this stage.

My chief concern about television in the courtroom, then, is the same one raised by the Florida Bar. We simply do not know enough about how this process affects jurors and witnesses. I also believe that jurors, witnesses, victims and the defendant must have a right to privacy in certain matters which can only be handled on an individual basis. For example, the filming of a defendant who is having restraints placed on him, or the instance of a witness who refuses to testify if they are filmed are matters that require individual decisions. We must not lose sight of the tension and vulnerability that a person feels while on the witness stand, without the presence of the photographing media. That person is at a disadvantage; I do not want to see it compounded until we know more about its influence on all and unless there can be judicial control.

While I was preparing this report, I read Chapter II of Marshall McLuhan's book: Understanding Media: The Extensions of Man:

The comment on the jacket of the paperback edition which I used says that the book raises two fundamental questions about our modern world: What are communications and how do communications affect mankind? The thoughts and ideas which I encountered in reading that chapter convince me that we must take a cautious approach to the subject of television in the courtroom. It is my belief that television has a powerful and a little understood effect on man; a more complex influence than I had previously believed. I have included several quotes from the book that interested me.

> "The effect of T.V., as the most recent and spectacular electric extension of our central nervous system, is hard to grasp for various reasons. Since it has affected the totality of our lives, personal and social and political, it would be quite unrealistic to attempt a 'systematic' or visual presentation of such influence. Instead, it is more feasible to 'present' T.V. as a complex gestalt of data gathered almost at random.

"The Mackworth head-camera, when worn by children watching T.V., has revealed that their eyes follow, not the actions, but the reactions. The eyes scarcely deviate from the faces of the actors, even during scenes of violence. This head-camera shows by projection both the scene and the eye movement simultaneously. Such extraordinary behavior is another indication of the very cool and involving character of the medium.

"Now that we have considered the subliminal force of the T.V. image in a redundant scattering of samples, the question would seem to arise: 'What possible immunity can there be from the subliminal operation of a new medium like television?' People have long supposed that bulldog opacity, backed by firm disapproval, is adequate enough protection against any new experience. It is the theme of this book that not even the most lucid understanding of the peculiar force of a medium can head off the ordinary 'closure' of the senses that causes us to conform to the pattern of experience presented. The utmost purity of mind is no defense against bacteria, though the confreres of Lewis Pasteur tossed him out of the medical profession for his base allegations about the invisible operation of bacteria."

"This is not so much a visual as a tactual-auditory medium that involves all of our senses in depth interplay. For people long accustomed to the merely visual experience of the typographic and photographic varieties, it would seem to be the synesthesia, or tactual depth of T. V. experience, that dislocates things from their usual attitudes of passivity and detachment."

Respectfully submitted,

Marvin Mounts, Jr.

XC: Furnished to Counsel

STRAWN, et al., Report,
In Re: Petition of Post-
Newsweek Stations,
Florida, Inc., for Change
in Code of Judicial Conduct

IN THE SUPREME COURT OF FLORIDA

IN RE: PETITION OF :
POST-NEWSWEEK STATIONS, :
FLORIDA, INC., FOR CHANGE : CASE NO. 46,835
IN CODE OF JUDICIAL CONDUCT. :
:

JUL 24 19[illegible]
CLERK SUPREME COURT

REPORT OF DAVID U. STRAWN
RAYMOND W. BUCHANAN, MILAN
D. MESKE AND BERT PRYOR

Respectfully submitted:

DAVID U. STRAWN, Circuit Judge
18th Judicial Circuit of Florida

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Preface
by
Judge David Strawn

Our efforts thus far make it clear that insufficient courtroom photography data has been collected to dictate either the choice of a rule permitting or excluding cameras in the courtroom. Even interim rules proposed now could restrict the flow of information needed to make the best possible decision.

We strongly suggest that the court continue the experiment for another year.

The key to the Court's ultimate decision should perhaps be found in analysis of the effects of photography on lay trial participants. We have surveyed the attitudes of witnesses and jurors as we could, but these persons are not easily located except immediately following their participation in actual trials. Post-testimony and post-verdict sampling of these trial participants is needed in order to produce this vital information. The survey of these persons in the context of actual trials is of critical importance.

Live trial witnesses and jurors' attitudes about courtroom photography have not been adequately measured. The only means available to obtain data and make measurements of the attitudes of witnesses and jurors is by careful scientific coverage of actual trials where cameras are present. Collection of adequate quantities of this data will necessarily require the assistance of the Supreme Court of Florida.

Since constitutional issues are the focus of the Court's consideration, it would be unfortunate to give too little time to collection of the data necessary for the decision. The quality of the Court's ultimate decision in this case will depend largely upon the quantity and quality of information

presented to it. Rhetoric is an important constituent of any decision made in an adversary process. However, factual data about the attitudes of trial participants is essential to the making of the rule, since the rule will probably have the effect of governing trials for many years to come.

The Court needs to take a more active role in the necessary research in order for the data to be collected to be especially meaningful to the Court. We have demonstrated at Florida Technological University that the means are available for doing instructive research about the problem. All the participants in our research project are dedicated volunteers. But without specific guidance from the Court, there has been uncertainty about what information is needed by the Court as it makes its decision. It would be desirable if the Court were to sponsor this research at FTU. Funding should be readily available for such a project. By exchange between professional researchers and the Court, a more meaningful inquiry can be made.

We have attached some of the data from the five Florida trials which were actually measured by our team. Each trial involved extensive photographic media coverage. The method used gives the promise of important information which could be obtained in the coming year, with the Court's assistance.

It may also be that there are demographic differences in juror and witness attitudes in different parts of our state. For example, jurors in the 18th circuit have an average educational level of 13.1 years. Other locales may differ sharply. We should investigate whether features such as educational level have an effect on jurors' attitudes toward

courtroom photography. The additional experimental period would give us an opportunity to control for the demography of our subjects, in order to learn whether their attitudes vary in relation to age, experience and the like. If attitudes do vary, it would simply be the function of the researchers to report the variance to the Court, for decision by the Court.

In effect, the data attached are the products of a well performed pilot study. Further study is needed, as demonstrated by the pilot data. The cost of further study is beyond the means of those who volunteered for production of the work thus far obtained.

It has been our effort to impartially and competently collect information about the attitudes of trial participants toward cameras in Florida's courtrooms. Even so, our pilot study has led us to believe that the methodology should be improved and promptly used, with increasingly sensitive results. If it is the Court's decision to conduct an additional year of the experiment, and to utilize the expertise now accumulated at FTU, we can assure rapid response times. We, too, have accumulated experience in the past years' experiment. We have already overcome most of the difficulties of experiment design and execution. With the assistance of the Justices, we will be able to clear the remaining hurdles with increased ease.

## METHODOLOGY

The specific purpose of this study was to measure the impact of the use of television and still cameras in the courtroom on trial participants. To achieve this goal, two steps were taken. (1) One was the gathering of opinions from circuit judges, county judges, and trial attorneys. (2) The other phase was the gathering of opinions from participants in five trials. The attached questionnaires were used to collect the data. The questionnaires were mailed to judges and attorneys, while data from the five trials was collected immediately after the trial concluded.

Responses from judges and attorneys were gratifying. A total of 286 questionnaires were sent to circuit judges and we received 130 replies, which is a 45% return. 181 questionnaires were mailed to county judges, and we received 101 replies, or a 56% return. We mailed questionnaires to 570 trial attorneys and had 247 returned, a 43% return rate. For survey research, these sample returns are excellent. The five trials produced 121 more responses, 52 of which were responses from jurors who served in these trials. Thus, we have a total of 599 responses.

The responses from all respondents were fed into a computer for analysis. We have a voluminous collection of information which correlates responses to each question with

a number of different variables, like age, judicial circuit, etc. This report contains only the frequency of response and percentage for each question. All other information is available upon request.

The following four groups of tables summarize some of the results of our survey.

# Opinions of Trial Participants And Observers at Five Trials Involving Camera Coverage

## Introduction

The data in this report is organized into five sections. These include:

Section 1: Demographic characteristics of the sample (Tables 1-3).

Section 2: Perceptions of trial participants and observers regarding the effects of cameras on their own behavior (Tables 4-7).

Section 3: Perceptions of trial participants and observers regarding the effects of cameras on the behavior of other trial participants (Tables 8-15).

Section 4: Broad evaluative responses of trial participants and observers (Tables 16-25).

Section 5: Summary data (Tables 26-27).

# SECTION 1

## Demographic Characteristics of the Sample

TABLE 1

Percentage of Males and Females in Sample

| | N | Percent |
|---|---|---|
| Males | 66 | 54.5 |
| Females | 55 | 45.5 |
| Totals | 121 | 100 |

TABLE 2

Percentage of Respondents in Four Age Ranges

| | N | Percent |
|---|---|---|
| Under 20 | 11 | 9.1 |
| 21-30 | 28 | 23.1 |
| 31-40 | 22 | 18.2 |
| Over 40 | 58 | 47.9 |
| Totals | 121 | 100 |

TABLE 3

Percentage of Respondents by Role in Trial Process

| | N | Percent |
|---|---|---|
| Judge | 2 | 1.7 |
| Defense Attorney | 4 | 3.3 |
| Prosecuting Attorney | 6 | 5.0 |
| Defense Witness | 1 | .8 |

TABLE 3

Percentage of Respondents by Role in Trial Process

| | N | Percent |
|---|---|---|
| Prosecution Witness | 8 | 6.6 |
| Juror | 52 | 43.0 |
| Spectator | 28 | 23.1 |
| Court Reporter | 5 | 4.1 |
| Bailiff | 9 | 7.4 |
| Court Clerk | 6 | 5.0 |
| Totals | 121 | 100 |

# SECTION 2

## Perceptions of Trial Participants and Observers Regarding the Effects of Cameras on Their Own Behavior

TABLE 4

As a participant or observer in this trial, I found the presence and use of the television cameras to be very distractive.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Very distracting to respondent | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 10 | 10 | 90 | 0 |
| Witnesses | 9 | 22.2 | 66.6 | 11.1 |
| Jurors | 52 | 34.6 | 55.8 | 9.6 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 18.5 | 70.3 | 11.1 |
| Court Reporters | 5 | 80 | 20 | 0 |
| Bailiffs/Court Clerks | 15 | 13.3 | 80 | 6.7 |
| Totals | 120 | 27.5 | 64.1 | 8.3 |

TABLE 5

As a participant or observer in this trial, I found the presence and use of the still cameras to be very distractive.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Very distracting to respondent | | | | |
| Judges | 2 | 100 | 0 | 0 |
| Attorneys | 8 | 37.5 | 50 | 12.5 |
| Witnesses | 5 | 0 | 80 | 20 |
| Jurors | 46 | 39.2 | 52.2 | 8.7 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 26 | 19.2 | 69.3 | 11.5 |
| Court Reporters | 4 | 50 | 50 | 0 |
| Bailiffs/Court Clerks | 12 | 41.6 | 58.4 | 0 |
| Totals | 103 | 34 | 57.3 | 8.7 |

TABLE 6

As a participant or observer in this trial, I found the presence and use of the television cameras in the courtroom made me feel tense.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Made respondent feel tense | | | | |
| Judges | 2 | 0 | 100 | 0 |
| Attorneys | 10 | 10 | 90 | 0 |
| Witnesses | 9 | 22.2 | 77.7 | 0 |
| Jurors | 50 | 20 | 72 | 8 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 7.4 | 74.1 | 18.5 |
| Court Reporters | 5 | 60 | 40 | 0 |
| Bailiffs/Court Clerks | 15 | 0 | 100 | 0 |
| Totals | 118 | 15.2 | 77.1 | 7.6 |

TABLE 7

As a participant or observer in this trial, I found the presence and use of the still cameras in the courtroom made me feel tense.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Made respondent feel tense | | | | |
| Judges | 2 | 0 | 100 | 0 |
| Attorneys | 8 | 12.5 | 75 | 12.5 |
| Witnesses | 5 | 0 | 100 | 0 |
| Jurors | 44 | 20.5 | 77.3 | 2.3 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 4 | 80 | 16 |
| Court Reporters | 4 | 50 | 50 | 0 |
| Bailiffs/Court Clerks | 12 | 0 | 100 | 0 |
| Totals | 100 | 13 | 81 | 6 |

# SECTION 3

## Perceptions of Trial Participants and Observers Regarding the Effects of Cameras on the Behavior of Other Trial Participants

TABLE 8

In my opinion, the presence and use of television cameras in the courtroom inhibited the testimony of the witnesses.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Inhibited testimony of witnesses | | | | |
| Judges | 2 | 0 | 100 | 0 |
| Attorneys | 10 | 40 | 50 | 10 |
| Witnesses | 9 | 22.2 | 66.6 | 11.1 |
| Jurors | 51 | 17.6 | 50.9 | 31.4 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 18.5 | 48.1 | 33.3 |
| Court Reporters | 5 | 40 | 60 | 0 |
| Bailiffs/Court Clerks | 15 | 20 | 73.3 | 6.7 |
| Totals | 119 | 21 | 53.8 | 25.2 |

TABLE 9

In my opinion, the presence and use of the still cameras in the courtroom inhibited the testimony of the witnesses.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Inhibited testimony of witnesses | | | | |
| Judges | 2 | 0 | 0 | 100 |
| Attorneys | 8 | 50 | 37.5 | 12.5 |
| Witnesses | 5 | 0 | 100 | 0 |
| Jurors | 45 | 20 | 48.9 | 31.1 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 16 | 48 | 36 |
| Court Reporters | 4 | 50 | 50 | 0 |
| Bailiffs/Court Clerks | 12 | 25 | 58.4 | 16.7 |
| Totals | 101 | 21.8 | 50.5 | 27.7 |

TABLE 10

In my opinion the presence and use of television cameras in this trial had an intimidating effect on the judge.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Intimidated the judge | | | | |
| Judges | 2 | 0 | 100 | 0 |
| Attorneys | 10 | 0 | 90 | 10 |
| Witnesses | 9 | 11.1 | 77.8 | 11.1 |
| Jurors | 50 | 6 | 92 | 2 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 3.7 | 81.5 | 14.8 |
| Court Reporters | 5 | 0 | 100 | 0 |
| Bailiffs/Court Clerks | 15 | 0 | 93.3 | 6.7 |
| Totals | 118 | 4.2 | 89 | 6.8 |

TABLE 11

In my opinion the presence and use of still cameras in this trial had an intimidating effect on the judge.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Intimidated the judge | | | | |
| Judges | 2 | 0 | 100 | 0 |
| Attorneys | 8 | 0 | 87.5 | 12.5 |
| Witnesses | 5 | 0 | 80 | 20 |
| Jurors | 45 | 6.6 | 91.1 | 2.2 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 0 | 84 | 16 |
| Court Reporters | 4 | 0 | 100 | 0 |
| Bailiffs/Court Clerks | 12 | 0 | 91.7 | 8.3 |
| Totals | 101 | 3 | 89.1 | 7.9 |

TABLE 12

In my opinion the presence and use of television cameras in this trial did not affect the courtroom behavior of the attorneys in any way.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Did not affect attorneys | | | | |
| Judges | 2 | 100 | 0 | 0 |
| Attorneys | 10 | 60 | 30 | 10 |
| Witnesses | 9 | 44.4 | 22.2 | 33.3 |
| Jurors | 51 | 62.7 | 23.5 | 13.7 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 28 | 78.6 | 14.3 | 7.1 |
| Court Reporters | 5 | 60 | 40 | 0 |
| Bailiffs/Court Clerks | 15 | 66.7 | 13.3 | 20 |
| Totals | 120 | 65.8 | 20.8 | 13.3 |

TABLE 13

In my opinion the presence and use of still cameras in this trial did not affect the courtroom behavior of the attorneys in any way.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Did not affect the attorneys | | | | |
| Judges | 2 | 100 | 0 | 0 |
| Attorneys | 8 | 75 | 12.5 | 12.5 |
| Witnesses | 5 | 60 | 0 | 40 |
| Jurors | 45 | 66.7 | 22.2 | 11.1 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 26 | 76.9 | 15.3 | 7.7 |
| Court Reporters | 4 | 75 | 25 | 0 |
| Bailiffs/Court Clerks | 12 | 58.3 | 16.7 | 25 |
| Totals | 102 | 69.6 | 17.7 | 12.7 |

TABLE 14

In my opinion, the presence and use of television cameras in the courtroom in this trial caused the jurors to be distracted.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Distracted the jurors | | | | |
| Judges | 2 | 50 | 0 | 50 |
| Attorneys | 10 | 30 | 40 | 30 |
| Witnesses | 9 | 11.1 | 33.3 | 55.6 |
| Jurors | 51 | 21.6 | 70.5 | 7.8 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 14.8 | 62.9 | 22.2 |
| Court Reporters | 5 | 40 | 40 | 20 |
| Bailiffs/Court Clerks | 15 | 13.4 | 66.7 | 20 |
| Totals | 119 | 20.2 | 60.5 | 19.3 |

TABLE 15

In my opinion, the presence and use of still cameras in the courtroom in this trial caused the jurors to be distracted.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Distracted the Jurors | | | | |
| Judges | 2 | 50 | 0 | 50 |
| Attorneys | 8 | 37.5 | 12.5 | 50 |
| Witnesses | 5 | 0 | 60 | 40 |
| Jurors | 45 | 24.4 | 73.3 | 2.2 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 12 | 56 | 32 |
| Court Reporters | 4 | 50 | 25 | 25 |
| Bailiffs/Court Clerks | 12 | 16.7 | 58.3 | 25 |
| Totals | 101 | 21.8 | 58.4 | 19.8 |

# SECTION 4

## Broad Evaluative Responses of Trial Participants and Observers

TABLE 16

As a participant or observer in this trial, I believe the presence and use of the television cameras to be fair to the defendant.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| TV cameras fair to defendant | | | | |
| Judges | 2 | 0 | 50.0 | 50.0 |
| Attorneys | 10 | 50 | 20.0 | 30.0 |
| Witnesses | 9 | 44.4 | 22.2 | 33.3 |
| Jurors | 52 | 53.9 | 23.1 | 23.1 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 28 | 64.2 | 14.3 | 21.4 |
| Court Reporters | 5 | 20 | 80.0 | 0 |
| Bailiffs/Court Clerks | 15 | 60 | 6.7 | 33.3 |
| Totals | 121 | 53.7 | 21.5 | 24.8 |

TABLE 17

As a participant or observer in this trial, I believe the presence and use of the still cameras to be fair to the defendant.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Still cameras fair to defendant | | | | |
| Judges | 2 | 0 | 50 | 50 |
| Attorneys | 8 | 37.5 | 25 | 37.5 |
| Witnesses | 5 | 40 | 20 | 40 |
| Jurors | 46 | 54.3 | 26.1 | 19.6 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 68 | 12 | 20.0 |
| Court Reporters | 4 | 50 | 50 | 0 |
| Bailiffs/Court Clerks | 12 | 66.6 | 8.3 | 25.0 |
| Totals | 102 | 55.9 | 21.5 | 22.5 |

TABLE 18

As a participant or observer in this trial, I believe the presence and use of the television cameras to be fair to the witnesses.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| TV cameras fair to witnesses | | | | |
| Judges | 2 | 0 | 50 | 50 |
| Attorneys | 10 | 40 | 40 | 20 |
| Witnesses | 9 | 33.3 | 33.3 | 33.3 |
| Jurors | 51 | 49 | 25.5 | 25.5 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 63 | 22.2 | 14.8 |
| Court Reporters | 5 | 20 | 80 | 0 |
| Bailiffs/Court Clerks | 15 | 53.4 | 13.3 | 33.3 |
| Totals | 119 | 48.8 | 27.7 | 23.5 |

TABLE 19

As a participant or observer in this trial, I believe the presence and use of the still cameras to be fair to the witnesses.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Still cameras fair to witnesses | | | | |
| Judges | 2 | 0 | 50 | 50 |
| Attorneys | 8 | 25 | 50 | 25 |
| Witnesses | 5 | 40 | 20 | 40 |
| Jurors | 45 | 51.1 | 26.7 | 22.2 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 60 | 24 | 16 |
| Court Reporters | 4 | 25 | 75 | 0 |
| Bailiffs/Court Clerks | 12 | 41.6 | 25 | 33.3 |
| Totals | 101 | 47.5 | 29.7 | 22.8 |

TABLE 20

As a participant or observer in this trial, I believe the presence and use of the television cameras interferes with the conduct of the trial.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Interferes with conduct of trial | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 10 | 20 | 60 | 20 |
| Witnesses | 9 | 11.1 | 77.8 | 11.1 |
| Jurors | 51 | 21.5 | 66.7 | 11.8 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 27 | 22.2 | 70.3 | 7.4 |
| Court Reporters | 5 | 40 | 60 | 0 |
| Bailiffs/Court Clerks | 15 | 6.7 | 80 | 13.3 |
| Totals | 119 | 20.1 | 68.9 | 10.9 |

TABLE 21

As a participant or observer in this trial, I believe the presence and use of the still cameras interferes with the conduct of the trial.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Interferes with conduct of trial | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 8 | 12.5 | 37.5 | 50 |
| Witnesses | 5 | 0 | 100 | 0 |
| Jurors | 45 | 24.5 | 73.3 | 2.2 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 25 | 16 | 64 | 20 |
| Court Reporters | 4 | 50 | 50 | 0 |
| Bailiffs/Court Clerks | 12 | 8.3 | 66.7 | 25 |
| Totals | 101 | 19.8 | 67.3 | 12.9 |

TABLE 22

As a participant or observer in this trial, I believe the presence and use of the television cameras in the courtroom are in the best interest of the public.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| In best interest of the public | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 10 | 40 | 50 | 10 |
| Witnesses | 9 | 55.5 | 0 | 44.4 |
| Jurors | 50 | 62 | 18 | 20 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 28 | 82.2 | 10.7 | 7.1 |
| Court Reporters | 5 | 0 | 60 | 40 |
| Bailiffs/Court Clerks | 15 | 66.7 | 20 | 13.3 |
| Totals | 119 | 62.2 | 20.2 | 17.6 |

TABLE 23

As a participant or observer in this trial, I believe the presence and use of the still cameras in the courtroom is in the best interest of the public.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| In best interest of the public | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 8 | 25 | 50 | 25 |
| Witnesses | 5 | 60 | 0 | 40 |
| Jurors | 44 | 70.5 | 15.9 | 13.6 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 26 | 80.8 | 11.5 | 7.7 |
| Court Reporters | 4 | 25 | 25 | 50 |
| Bailiffs/Court Clerks | 12 | 66.7 | 16.7 | 16.7 |
| Totals | 101 | 66.3 | 17.8 | 15.8 |

TABLE 24

In my opinion the presence and use of the television cameras in the courtroom is a desirable practice.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| A desirable practice | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 10 | 50 | 30 | 20 |
| Witnesses | 9 | 44.4 | 22.2 | 33.3 |
| Jurors | 51 | 43.2 | 21.6 | 35.3 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 28 | 71.4 | 21.4 | 7.1 |
| Court Reporters | 5 | 0 | 80 | 20 |
| Bailiffs/Court Clerks | 15 | 60 | 13.3 | 26.7 |
| Totals | 120 | 50.9 | 24.1 | 25 |

TABLE 25

In my opinion the presence and use of the still cameras in the courtroom is a desirable practice.

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| A desirable practice | | | | |
| Judges | 2 | 50 | 50 | 0 |
| Attorneys | 8 | 37.5 | 37.5 | 25 |
| Witnesses | 5 | 60 | 0 | 40 |
| Jurors | 45 | 55.5 | 22.3 | 22.2 |
| Defendants | 0 | 0 | 0 | 0 |
| Spectators | 26 | 65.4 | 19.2 | 15.4 |
| Court Reporters | 4 | 25 | 50 | 25 |
| Bailiffs/Court Clerks | 12 | 50 | 16.6 | 33.3 |
| Totals | 102 | 54.9 | 22.6 | 22.5 |

# SECTION 5

## Summary Data

TABLE 26

Summary of Opinion Regarding the Use of TV Cameras in the Courtroom

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Very distracting to respondent | 120 | 27.5 | 64.1 | 8.3 |
| Made respondent feel tense | 118 | 15.2 | 77.1 | 7.6 |
| Fair to defendant | 121 | 53.7 | 21.5 | 24.8 |
| Fair to witnesses | 119 | 48.8 | 27.7 | 23.5 |
| Interferes with conduct of trial | 119 | 20.1 | 68.9 | 10.9 |
| In best interest of public | 119 | 62.2 | 20.2 | 17.6 |
| A desirable practice | 120 | 50.9 | 24.1 | 25 |
| Inhibited testimony of witnesses | 119 | 21 | 43.8 | 25.2 |
| Intimidated judge | 118 | 4.2 | 89 | 6.8 |
| Did not affect attorneys | 120 | 65.8 | 20.8 | 13.3 |
| Distracted the jurors | 119 | 20.2 | 60.5 | 19.3 |

TABLE 27

Summary of Opinion Regarding the Use of Still Cameras in the Courtroom

| Statement | Number of Respondents | Agree (%) | Disagree (%) | Uncertain (%) |
|---|---|---|---|---|
| Very distracting to respondent | 103 | 34 | 57.3 | 8.7 |
| Made respondent feel tense | 100 | 13 | 81 | 6 |
| Fair to defendant | 102 | 55.9 | 21.5 | 22.5 |
| Fair to witnesses | 101 | 47.5 | 29.7 | 22.8 |
| Interferes with conduct of trial | 101 | 19.8 | 67.3 | 12.9 |
| In best interest of public | 101 | 66.3 | 17.8 | 15.8 |
| A desirable practice | 102 | 54.9 | 22.6 | 22.5 |
| Inhibited testimony of witnesses | 101 | 21.8 | 50.5 | 27.7 |
| Intimidated judge | 101 | 3 | 89.1 | 7.9 |
| Did not affect attorneys | 102 | 69.6 | 17.7 | 12.7 |
| Distracted the jurors | 101 | 21.8 | 58.4 | 19.8 |

## Observations Drawn From The Opinion Survey of Participants At Five Trials

This report includes the responses of 121 participants in five trials. In each case the respondents completed the questionnaire at the conclusion of the trial.

While the majority of respondents reported that the presence of the cameras was neither distracting nor tension-producing for them, our findings indicate that some participants did perceive adverse effects of the cameras. For example, over one-third of the jurors reported the TV and still cameras to be "very distracting," and one out of five jurors believed that the cameras caused them to feel tense (see Tables 4-7).

Our small sample of judges, attorneys, witnesses, and other key trial participants makes it infeasible to draw inferences from their data. However, by combining the data of the 121 respondents it can be seen that approximately 20% of the trial participants believed that the presence of cameras inhibited witness testimony (Tables 8-9), and affected the behavior of the attorneys and jurors (Tables 12-15). It should also be noted, however, that approximately 80% of our sample either disagreed or were uncertain that the cameras produced such effects.

We also requested responses to a series of evaluative statements. Again, the majority of trial participants did not render negative evaluations of the use of cameras in the courtroom. Still, a noticeable and consistent number did respond negatively. For example, a range of 17.8% to 29.7% of the respondents disagreed that the use of cameras is fair to the defendant and witnesses (Tables 16-19), and reported feeling that the use of cameras interfered with the conduct of the trial (Tables 20-21). Tables 24 and 25 show that slightly over half of the respondents believe that the use of cameras is a desirable practice.

Summary of Opinions Expressed by
County Judges Regarding The Use
Of Cameras In The Courtroom

## Introduction

The summary data which follows has been organized into five tables. These include:

Table 1: The County Judges' perceptions regarding the effects of the presence of cameras on themselves.

Table 2: The County Judges' perceptions of the effects of cameras on other trial participants.

Table 3: The County Judges' opinions regarding continued use of cameras in the courtroom under specified hypothetical conditions.

Table 4: The County Judges' opinions regarding continued use of cameras in the courtroom.

Table 5: The types of trials which have attracted camera coverage.

## County Judges

### TABLE 1

County Judges' perceptions of how the presence of cameras affected them.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| Did you experience any serious trial disruptions due to the presence of cameras in your courtroom? | | |
| TV cameras | 4.2 (1)[a] | 95.8 (23) |
| Still cameras | 3.0 (1) | 97.0 (32) |
| Did you personally feel any tenseness or serious discomfort due to the presence and use of the cameras in your courtroom? | | |
| TV cameras | 37.0 (10) | 63.0 (17) |
| Still cameras | 20.6 (7) | 79.4 (27) |

[a]Number of respondents in parentheses

County Judges

TABLE 2

County Judges' perceptions regarding the effects of cameras on other trial participants.

| Question | | Yes (percent) | No (percent) |
|---|---|---|---|
| From your observations, did the presence and use of cameras in your courtroom cause serious distractions to jurors? | | | |
| | TV cameras | 14.3 (3)[a] | 81.0 (17) |
| | Still cameras | 12.5 (4) | 87.5 (28) |
| From your observations, do you believe the testimony of the witnesses was adversely affected by the presence and use of cameras in the courtroom? | | | |
| | TV cameras | 22.7 (5) | 77.3 (17) |
| | Still cameras | 18.8 (6) | 81.3 (26) |
| In your opinion, did the presence of cameras in the courtroom cause the defendant to experience undue harassment or indignities? | | | |
| | TV cameras | 16.7 (4) | 83.3 (20) |
| | Still cameras | 9.7 (3) | 90.3 (28) |
| Do you feel the attorneys made any serious efforts to "play to the public audience" when the cameras were used in your courtroom? | | | |
| | TV cameras | 40.7 (11) | 59.3 (16) |
| | Still cameras | 22.9 (8) | 77.1 (27) |

[a]

## County Judges

### TABLE 3

County Judges' opinions regarding continued use of cameras in the courtroom under specified hypothetical conditions.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| If you knew that the use of the cameras in the courtroom was believed by one or two jurors, on the average, to be unfair to the defendant, would you object to the use of the cameras? | 81.5 (75)[a] | 18.5 (17) |
| If you knew that the use of cameras in the courtroom would cause, on the average, one or two jurors to be momentarily distracted at various times during the course of a trial, would you object to the presence of the cameras? | 63.2 (60) | 36.8 (35) |

[a]Number of respondents in parentheses

## County Judges

### TABLE 4

County Judges' Opinions regarding continued use of cameras in the courtroom.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| The Supreme Court's one year experiment with cameras in the courtroom will soon terminate. Based upon your observations, do you believe that the court should continue to allow live camera coverage of courtroom procedures? | | |
| County Judges who have presided over at least one trial in which cameras were used. | 55.9 (19)[a] | 44.1 (15) |
| County Judges who have not experienced cameras in their courtrooms. | 35.7 (20) | 64.3 (36) |
| Responses of all County Judges. | 42.0 (39) | 57.1 (52) |

[a]Number of subjects in parentheses.

## County Judges

### TABLE 5

Kinds of trials which attracted camera coverage in county courts.*

| Type of Trial | Number |
|---|---|
| Sex offenses | 14 |
| Homicide | 13 |
| Larceny | 7 |
| Criminal-conspiracy | 5 |
| Assault-battery | 5 |
| Arson-criminal mischief | 3 |
| Child abuse | 3 |
| Bribery-corruption | 3 |
| Trespass | 2 |
| Robbery | 2 |
| Gambling | 1 |
| Burglary | 1 |
| Drug abuse | 1 |
| Other | 17 |

*These figures represent a total, as reported by all respondents. It should be noted that different respondents may, at times, be reporting the same trial.

Summary of Opinions Expressed by
Circuit Judges Regarding The Use
Of Cameras In The Courtroom

## Introduction

The summary data which follows has been organized into five tables. These include:

Table 1: The Circuit Judges' perceptions regarding the effects of the presence of cameras on themselves.

Table 2: The Circuit Judges' perceptions of the effects of cameras on other trial participants.

Table 3: The Circuit Judges' opinions regarding continued use of cameras in the courtroom under specified hypothetical conditions.

Table 4: The Circuit Judges' opinions regarding continued use of cameras in the courtroom.

Table 5: The types of trials which have attracted camera coverage.

## Circuit Judges

### TABLE 1

Circuit Judges' perceptions of how the presence of cameras affected them.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| Did you experience any serious trial disruptions due to the presence of cameras in your courtroom? | | |
| TV cameras | 12.2 (6)[a] | 87.8 (43) |
| Still cameras | 4.4 (3) | 95.6 (65) |
| Did you personally feel any tenseness or serious discomfort due to the presence and use of the cameras in your courtroom? | | |
| TV cameras | 39.6 (19) | 60.4 (29) |
| Still cameras | 27.3 (18) | 72.7 (48) |

[a]Number of respondents in parentheses

Circuit Judges

TABLE 2

Circuit Judges' perceptions regarding the effects of cameras on other trial participants.

| Question | | Yes (percent) | No (percent) |
|---|---|---|---|
| From your observations, did the presence and use of cameras in your courtroom cause serious distractions to jurors? | | | |
| | TV cameras | 23.4 (11)[a] | 76.6 (36) |
| | Still cameras | 16.9 (11) | 83.1 (54) |
| From your observations, do you believe the testimony of the witnesses was adversely affected by the presence and use of cameras in the courtroom? | | | |
| | TV cameras | 31.9 (15) | 68.1 (32) |
| | Still cameras | 19.7 (13) | 80.3 (53) |
| In your opinion, did the presence of cameras in the courtroom cause the defendant to experience undue harassment or indignities? | | | |
| | TV cameras | 19.1 (9) | 80.9 (38) |
| | Still cameras | 10.8 (7) | 89.4 (56) |
| Do you feel the attorneys made any serious efforts to "play to the public audience" when the cameras were used in your courtroom? | | | |
| | TV cameras | 29.4 (15) | 70.6 (36) |
| | Still cameras | 17.6 (12) | 82.4 (56) |

[a]Number of respondents in parentheses

Circuit Judges

TABLE 3

Circuit Judges' opinions regarding continued use of cameras in the courtroom under specified hypothetical conditions.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| If you knew that the use of the cameras in the courtroom was believed by one or two jurors, on the average, to be unfair to the defendant, would you object to the use of the cameras? | 75.2 (91)[a] | 24.8 (30) |
| If you knew that the use of cameras in the courtroom would cause, on the average, one or two jurors to be momentarily distracted at various times during the course of a trial, would you object to the presence of the cameras? | 53.3 (65) | 46.7 (57) |

[a]Number of respondents in parentheses

Circuit Judges

TABLE 4

Circuit Judges' opinions regarding continued use of cameras in the courtroom.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| The Supreme Court's one year experiment with cameras in the courtroom will soon terminate. Based upon your observations, do you believe that the court should continue to allow live camera coverage of courtroom procedures? | | |
| Circuit Judges who have presided over at least one trial in which cameras were used. | 55.6 (35)[a] | 44.4 (28) |
| Circuit Judges who have not experienced cameras in their courtrooms. | 38.3 (18) | 61.7 (29) |
| Responses of all Circuit Judges. | 47.7 (53) | 52.3 (58) |

[a]Number of subjects in parentheses.

OPINION SURVEY

CIRCUIT JUDGES

What kinds of trials did the media typically cover?*

| Type of Trial | Number |
|---|---|
| Homicide | 38 |
| Sex offense | 16 |
| Robbery | 10 |
| Criminal conspiracy | 9 |
| Child abuse | 8 |
| Assault-battery | 5 |
| Weapons | 5 |
| Drug abuse | 5 |
| Burglary | 4 |
| Perjury | 3 |
| Larceny | 3 |
| Gambling | 2 |
| Arson-criminal mischief | 2 |
| Bribery-corruption | 2 |
| Other | 16 |

*These figures represent a total, as reported by all respondents. It should be noted that different respondents may, at times, be reporting the same trial.

## Observations Drawn From The Opinion Survey Of County and Circuit Judges

In general, the majority of county and circuit judges did not indicate that cameras in the courtroom were overly distractive or caused any serious trial disruptions. In addition, it was believed by most of the judges that the testimony of witnesses was not adversely affected. The vast majority of them believed that the camera presence did not cause undue harassments or indignities to defendants. The judges for the most part, appeared to adjust to the cameras very well, with most of them admitting to no serious discomfort or tenseness. The fear that attorneys will "play to the cameras" was not substantiated by the majority of the judges in our sample.

Of special interest is the fact that judges who presided over one or more trials in which cameras were present were more favorably disposed toward the cameras than were those who had not experienced cameras in their courtrooms (see Table 4). This is a consistent finding across all judicial respondents. This observation suggests familiarity with cameras in the courtroom tends to reduce anxiety concerning their potential harm.

Still cameras were found to be far less offensive in most instances than television cameras, even though some respondents did note that loud camera shutters were momentarily distracting.

Nevertheless, the overall majority of both county and circuit

judges rejected the continued practice of allowing live camera coverage in the courtroom. The most substantial reasons which appear to emerge may be summarized in one single, over-riding observation. Most judges who reject cameras in the courtroom do so on the philosophical grounds that "Justice must satisfy the appearance of justice." They believe that our system of law must prevent even the possibility of unfairness to a defendant. They are not yet convinced that cameras do not have a prejudicial effect on jurors and witnesses.

We recommend that the camera in the courtroom experiment continue so that more specific research can be done involving jurors and witnesses. Our pilot study, involving five trials, indicates that the problem may not be as serious as some suppose. However, additional data is needed before more reliable inferences can be drawn.

Summary of Opinions Expressed by
Trial Attorneys Regarding the Use
Of Cameras in The Courtroom

## Introduction

The summary data which follows has been organized into five tables. These include:

| | |
|---|---|
| Table 1: | The Trial Attorneys' perceptions regarding the effects of the presence of cameras on themselves. |
| Table 2: | The Trial Attorneys' perceptions of the effects of cameras on other trial participants. |
| Table 3: | The Trial Attorneys' opinions regarding continued use of cameras in the courtroom under specified hypothetical conditions. |
| Table 4: | The Trial Attorneys' opinions regarding continued use of cameras in the courtroom. |
| Table 5: | The types of trials which have attracted camera coverage. |

## Trial Attorneys

### TABLE 1

Trial Attorneys' perceptions of how the presence of cameras affected them.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| Did you experience any serious trial disruptions due to the presence of cameras in your courtroom? | | |
| TV cameras | 17.4 (15)[a] | 82.6 (71) |
| Still cameras | 11.2 (10) | 88.8 (79) |
| Did you personally feel any tenseness or serious discomfort due to the presence and use of the cameras in your courtroom? | | |
| TV cameras | 45.6 (41) | 54.4 (49) |
| Still cameras | 28.7 (27) | 71.3 (67) |

[a]Number of respondents in parentheses

Trial Attorneys

TABLE 2

Trial Attorneys' perceptions regarding the effects of cameras on other trial participants.

| Question | | Yes (percent | No(percent) |
|---|---|---|---|
| From your observations, did the presence and use of cameras in your courtroom cause serious distractions to jurors? | | | |
| | TV cameras | 51.8 (44)[a] | 48.2 (41) |
| | Still cameras | 34.5 (30) | 65.5 (57) |
| From your observations, do you believe the testimony of the witnesses was adversely affected by the presence and use of cameras in the courtroom? | | | |
| | TV cameras | 49.4 (44) | 50.6 (45) |
| | Still cameras | 33.7 (30) | 66.3 (59) |
| In your opinion, did the presence of cameras in the courtroom cause the defendant to experience undue harassment or indignities? | | | |
| | TV cameras | 49.4 (42) | 50.6 (43) |
| | Still cameras | 39.6 (36) | 60.4 (55) |
| Do you feel the attorneys made any serious efforts to "play to the public audience" when the cameras were used in your courtroom? | | | |
| | TV cameras | 38.2 (34) | 61.8 (55) |
| | Still cameras | 22.7 (22) | 77.3 (75) |

[a]Number of respondents in parentheses

Trial Attorneys

TABLE 3

Trial Attorneys' opinions regarding continued use of cameras in the courtroom under specified hypothetical conditions.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| If you knew that the use of the cameras in the courtroom was believed by one or two jurors, on the average, to be unfair to the defendant, would you object to the use of the cameras? | 76.6 (183)[a] | 23.4 (56) |
| If you knew that the use of cameras in the courtroom would cause, on the average, one or two jurors to be momentarily distracted at various times during the course of a trial, would you object to the presence of the cameras? | 81.2 (181) | 18.8 (42) |

[a]Number of respondents in parentheses

Trial Attorneys

TABLE 4

Trial Attorneys' opinions regarding continued use of cameras in the courtroom.

| Question | Yes (percent) | No (percent) |
|---|---|---|
| The Supreme Court's one year experiment with cameras in the courtroom will soon terminate. Based upon your observations, do you believe that the court should continue to allow live camera coverage of courtroom procedures? | | |
| Trial Attorneys who have participated in at least one trial in which cameras were used. | 47.8 (43)[a] | 52.2 (47) |
| Trial Attorneys who have not experienced cameras in their courtrooms. | 34.6 (47) | 65.4 (89) |
| Responses of all Trial Attorneys. | 40.4 (92) | 59.6 (136) |

[a]Number of subjects in parentheses

Trial Attorneys

TABLE 5

Kinds of trials which attracted camera coverage in county courts.*

| Type of Trial | Number |
|---|---|
| Homicide | 199 |
| Sex offenses | 108 |
| Bribery-corruption | 76 |
| Child abuse | 54 |
| Robbery | 49 |
| Drug abuse | 47 |
| Criminal-conspiracy | 47 |
| Arson-criminal mischief | 33 |
| Gambling | 30 |
| Perjury | 21 |
| Weapons | 17 |
| Assault-battery | 17 |
| Burglary | 13 |
| Larceny | 12 |
| Trespass | 6 |
| Bad Checks | 6 |
| Other | 39 |

*These figures represent a total as reported by all respondents. It should be noted that different respondents may, at times, be reporting the same trial.

## Observations Drawn From The Opinion Survey of Attorneys

Trial attorneys tended to agree with county and circuit judges that cameras in the courtroom did not present any serious trial disruptions. However, trial attorneys overall tended to be more negative toward the cameras than judges. For example, attorneys, by a small majority (52%), tended to believe that the cameras were a serious source of distraction to jurors. They were almost evenly split concerning whether or not cameras adversely affected the testimony of witnesses and whether or not they caused the defendants to suffer undue harassment or indignities.

Generally, attorneys do not perceive that their colleagues "play to the cameras," however, a 46% minority did admit to feelings of tenseness and discomfort. Attorneys found still cameras to be far less offensive than television cameras.

Overall, the majority of the attorneys did express strong feelings against continued use of cameras in the courtroom (see Table 4). However, as with judges, attorneys who have experienced cameras in the courtroom tended to be more favorably disposed toward their use, although those who favored were still in a slight minority (see Table 4).

## Questions Suggested by the Data

We offer the following questions as subjects of concern revealed by our research. We realize some, if not all, may be obvious to the Court, and we offer them for whatever corroborative value they may have:

1. Should there be tighter regulations on shutter noise for still cameras? Our research indicates there was frequent criticism concerning shutter noise, although there were no strong objections to still cameras per se.
2. Should a rule be considered forbidding photographing or video-taping jurors while they are in the jury box during the course of a trial? In addition, should a rule be considered forbidding photographing or video-taping of the venire during voir dire? Our data suggest that 20-33% of the jurors reported concern over the use of cameras in the courtroom.
3. Should tighter controls be exerted concerning where TV cameras are placed in the courtroom? Subjects have commented on perceived unfavorable locations of cameras. In addition, should sound jacks be installed in the rear of the courtroom to insure proper quality of sound?

4. Should consideration be given concerning a rule regulating camera coverage of victims of rape and minors who have been victims of sexual crimes?

## Research Team

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*Circuit Court*
*Eighteenth Judicial Circuit*

BREVARD COUNTY COURTHOUSE
TITUSVILLE, FLORIDA 32780

DAVID U. STRAWN
CIRCUIT JUDGE

259-3447

July 20, 1978

Clerk of the Supreme Court
Supreme Court of Florida
The Supreme Court Building
Tallahassee, Florida 32304

JUL 24 19[illegible]

The attached material is for filing in the Petition Of Post-Newsweek Stations, Florida, Inc., For Change In Code Of Judicial Conduct, case no. 46,835.

Thank you for your assistance in this matter.

Cordially,

Sharon Long
Secretary to
DAVID U. STRAWN

encl.

# Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom (Wisconsin)

FILED

MAR 30 1979

CLERK OF SUPREME COURT
MADISON, WISCONSIN

# REPORT OF THE

# SUPREME COURT COMMITTEE

# TO MONITOR AND EVALUATE THE USE OF

# AUDIO AND VISUAL EQUIPMENT IN THE COURTROOM

April 1, 1979

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# REPORT OF THE COMMITTEE TO MONITOR CAMERAS IN THE COURTROOM

MARCH 24, 1979

## I.

## THE COURT ORDER

The Supreme Court issued an order on December 23, 1977, which suspended Rule 14 of the Code of Judicial Ethics for a one-year period beginning April 1, 1979, and following a hearing which was held on February 20, 1978, the Court, on March 16, 1978, adopted rules or guidelines to govern the use of audio or visual equipment in the courtroom during the one-year period. The Court also decided, in its general order, to appoint a committee to monitor and evaluate the use of audio or visual equipment in the courtroom, the committee to consist of three representatives of the news media to be nominated by the news media, three trial judges, two members of the State Bar nominated by the State Bar, and three non-lawyers. The committee was directed to report to the Court no later than March 1, 1979, but at the request of the committee the Court extended the reporting date to April 1, 1979.

The following persons were appointed to the monitoring committee:

Judge Michael T. Sullivan, Milwaukee
Judge William F. Eich, Madison
Judge William J. Duffy, Green Bay
Professor David Fellman, University of Wisconsin-Madison, Chairman
Professor James Hoyt, University of Wisconsin-Madison
Ms. Anne Rossmeier, Stevens Point
Attorney William Adler, Eau Claire
Attorney James Peter O'Neill, Milwaukee
Ms. Nancy Mersereau, Port Washington
Edward Hinshaw, Milwaukee
Mr. Richard Bauer, Milwaukee

The reporter for the committee was Court Commissioner William Mann, and the committee was assisted by William Gansner of the Wisconsin Department of Justice and a representative of the State Public Defender's office. The

committee takes this opportunity to express its special appreciation for the efficient services of Mr. Mann. At its request, the committee was authorized by the Chief Justice to employ several graduate students or law students, to be compensated at an hourly rate, to serve as court observers. The Court's instructions to the committee were spelled out by the Chief Justice in a statement dated April 26, 1978, attached to this report as Appendix A.

The Court adopted the following guidelines governing the use of audio or visual equipment in courtrooms for the duration of the experimental year, April 1, 1978 through March 31, 1979:

1. Authority of Presiding Judge

These standards of conduct do not limit or restrict the power, authority, or responsibility otherwise vested in the presiding judge to control the conduct of proceedings before the judge. The authority of the presiding judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by these standards.

2. Media Coordinator

The media covering each administrative district shall designate a coordinator to work with the chief judge of the administrative district and the presiding judge in a court proceeding in implementing these standards.

3. Equipment and Personnel

a) One portable camera, (either 16 mm sound on film, self-blimped, camera, or videotape electronic camera) operated by one person is authorized in any court proceeding. One additional camera operated by one additional person is authorized if a request to film or tape the proceeding is received from a person or organization which does not have a camera of the same type as the first camera authorized. One additional camera operated by one additional person is authorized to permit a person or organization to televise live or to film the entire court proceeding from beginning to end. A maximum of three cameras are authorized under this standard.

b) Two still photographers, each using not more than two cameras with not more than two lenses for each camera, are authorized to take photographs for the print media in any court proceeding.

c) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes must be made through any existing audio system in the court facility. If no suitable audio system exists in the court facility, microphones and related wiring must be unobtrusive.

d) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by these standards in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all audio or visual equipment from the proceeding.

4. Sound and Light Criteria

Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices must not be used in connection with any audio or visual equipment. Only equipment approved by the presiding judge in advance of the court proceeding may be used during the proceeding.

5. Location of Equipment and Personnel

a) The presiding judge shall designate the location in the courtroom for the camera equipment and operators. The presiding judge shall restrict camera equipment and operators to areas open to the public, but the camera equipment and operators must not block the view of persons seated in the public area of the courtroom.

b) Camera operators shall occupy only the area authorized by the presiding judge and shall not move about the courtroom during the court proceeding. Film, tape, or lenses must not be changed during the court proceeding. Equipment authorized by these standards must not be moved or changed during the court proceeding.

6. Courtroom Light Sources

Modifications in the lighting of a court facility may be made only with the approval of the presiding judge. Approval of other authorities may also be required.

7. Conferences

Audio pickup, broadcast, or recording of a conference in a court facility between an attorney and client, co-counsel, or attorneys and the presiding judge held at the bench is not permitted.

8. Recesses

Audio or visual equipment authorized by these standards must not be operated during a recess in a court proceedings.

9. Use of Evidence

Any film, videotape, photograph, or audio reproduction made as a result of these standards is inadmissible as evidence in any court proceeding.

10. Resolution of Disputes

A dispute as to the application of these standards in a court proceeding may be referred only to the chief judge of the administrative district for resolution as an administrative matter. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by these standards any order or ruling of a presiding judge or chief judge under these standards.

11. Prohibition on Photographing at Request of Participant

A presiding judge may for cause prohibit the photographing of a participant with a film, videotape or still camera on the judge's own motion or the request of a participant in the court proceeding.

12. Inapplicability to Individuals

The privileges granted by these standards may be exercised only by persons or organizations which are part of the news media.

In addition, on April 21, 1978, Chief Justice Beilfuss sent to all judges in the State the following explanatory statement:

The first two weeks of the one year trial period during which audio and visual equipment is permitted in courtrooms have demonstrated that there may be some misunderstanding concerning the Standards and their application. For this reason the following explanatory comments may be helpful.

1. Perhaps the greatest confusion has arisen over the authority of the presiding judge to prohibit the use of audio or visual equipment in the courtroom. This involves the application of Standards 1 and 11.

Standard No. 1 is intended to point out that the rights granted under the Standards to the news media are not superior to those of the public or reporters for the news media to attend court proceedings. Thus, if the presiding judge under existing law can exclude the public and representatives of the news media from a court proceeding, then persons operating audio or visual equipment under the standards can also be excluded.

Standard No. 11, on the other hand, is intended only to permit the presiding judge for cause in the exercise of discretion to prohibit the photographing of an individual participant in a trial (including parties, witnesses, jurors, counsel, or court personnel) either at the request of a participant or on the judge's own motion. It is not intended to permit the judge to ban all cameras and audio equipment from a trial except as may be authorized under Standards No. 1 and 10. It is not intended to give a witness or other participant the right to prohibit the photographing of the witness while testifying. It is not intended to permit the presiding judge to prohibit the recording of the testimony of a witness, except as may be authorized under Standards No. 1 and 10.

"Cause" as used in Standard No. 11 is intended to require that there be some reasonable basis other than the desire not to be photographed to justify prohibiting the photographing of a participant. Cause may include a reasonable fear of physical harm, the protection of a minor's reputation, a reasonable fear of undue embarrassment, or the like. The trial judge may require requests under Standard No. 11 to be filed with the Clerk of the Court.

2. Standard No. 3(d) requires that any request to engage in an activity authorized by the Standards be made through the media coordinator. A request should not be made to the presiding judge. The fact that only one request is received initially does not mean that additional requests will not be filed later, and thus all should go to the coordinator. The presiding judge should not be involved in the granting of a request to use audio or visual equipment unless the media coordinator is unable to obtain agreement among media personnel.

3. Standard No. 4 requires that only equipment which is approved by the presiding judge may be used in the courtroom. The presiding judge must check prior to trial each item of equipment, including both TV and still cameras, to determine whether the item produces distracting light or sound. Once a judge has approved a certain type of equipment, it need not be reinspected for each trial.

4. Standard No. 5(a) provides that the presiding judge must restrict camera equipment to areas open to the public. This means the spectator area behind the rail. It has come to my attention that some judges have permitted cameras to be placed in the jury box or other locations in front of the rail. This is not permissible under the Standards.

5. Standard No. 12 limits the right to use audio or visual equipment in the courtroom to representatives of the news media. Individuals who are simply spectators, relatives, tourists, or curiosity seekers may not use audio or visual equipment in the courtroom.

For use by the committee's court observers, where feasible, questionnaires were prepared by the committee to serve as a basis for interviews with trial judges, counsel, witnesses and jurors. These questionnaires are attached to this report as Appendices B, C, D and E.

It is of some interest to note, as part of the history of the problem under discussion, that on January 27, 1970, the Supreme Court created a committee of 12 persons, which included 3 judges, several lawyers, several people from the media, and one University Professor, to advise the Court on the desirability of modifying or dropping Rule 14. While that committee, in its final report of August 18, 1970, agreed on many matters, on the crucial issues it was sharply divided. Thus, 8 members of the committee favored the broadcasting of court proceedings by radio, whereas 4 were opposed, while the vote was 6-6 on the question of permitting the televising of judicial proceedings. The text of the 1970 report is attached as Appendix F. Following receipt of this report, the Court, by a vote of 4-3, voted to retain Rule 14.

## II.

## VARIOUS CASES

In the course of its work, the committee was informed by various sources of a variety of experiences in Wisconsin courtrooms relating to the use of photography. A few of these experiences are spelled out in the following sections.

### (1) STATE v. DILLABAUGH

This highly publicized case was heard in the Circuit Court of Dane County, before Judge William C. Sachtjen and a jury. The trial began on the morning of June 5, 1978, and ran for 3 days. One of the committee's court observers, Mr. Kim Kodousek, a law student at the University of Wisconsin-Madison, sat through the entire trial, and interviewed most of the participants

afterwards. This summary of the case consists of his observations. The point at issue was the alleged battery of a young boy by a minister.

Our observer wrote a detailed account of the progress of the case, day by day, and then interviewed the major participants (except the jurors) on the basis of the prepared questionnaires. What follows is a reproduction of all the materials submitted by Mr. Kodousek:

June 5, 1978

The equipment in the courtroom consisted of 1 black and white cable TV camera, 1 color "mini-cam" TV camera, 1 movie film camera for TV, and 2 still photographers, each with 2 still cameras.

The three TV cameras, each with one cameraman, were placed in the far right aisle near the front of the gallery, effectively blocking that aisle. The still cameramen were seated in the front row of the gallery. All were reminded of the guidelines as to photographing recesses and bench conferences by the chief bailiff before the voir dire began.

The Madison cable TV station broadcast the proceedings "live" during the day and showed several hours of it each night. A monitor was placed in the hallway of the courthouse, and when it was learned that witnesses in the hall could hear and see the proceedings, the monitor's audio was ordered turned off by the judge.

The sound for the TV cameras was supplied by 4 microphones placed in the courtroom, in addition to the regular courtroom microphones. Two TV mikes were on the counsel table, one was at the judge's bench and one was on the witness stand.

Photographing began during the voir dire as the TV cameras followed the jurors taking their seats. The movie camera could be heard by the observer just before the rail, but only during very quiet pauses. The shutters of the still cameras were clearly audible throughout the trial. No flash equipment or special lights were used by any of the cameras.

At the voir dire the prosecutor mentioned the cameras' presence to the jury, and asked "Are there any of you who feel that the presence of cameras might affect your duties as a juror?" There was no response.

The jurors were instructed not to watch anything on television or view other news media by the judge, but the instruction was not specific as to the televised trial itself. The cameras themselves were apparently no distraction to the jurors, since their eyes rarely, if ever, strayed to the direction of the TV cameras or the still photographers.

Two media-related problems were observed the first day. First, a still photographer requested permission of the bailiff to photograph the gallery. Raising the camera above his head would have been a distraction, the bailiff reasoned, but the photographer was allowed to turn around from his front row seat and take pictures from eye level.

Second, as mentioned above there was some concern that the witnesses, who were excluded from the courtroom, were viewing the trial from the TV monitors in the hallway outside. The sound on these monitors was ordered turned off by the judge, and the witnesses apparently instructed to refrain from watching the live telecast while waiting in the defense counsel's nearby office.

The two still photographers took approximately 53 photos during the first day.

Tuesday, June 6, 1978

When the trial was convened the next morning the media equipment in the courtroom was the same as had been there Monday. However, at the first recess the bailiff received requests from two other still photographers to take the place of the photographers who had originally applied for permission to photograph the trial and who had sat through it the day before. All wanted photographs of the 5-year-old complainant who was to take the stand after the recess. The photographers were from each of Madison's three daily newspapers, and one from the student daily, The Cardinal.

The bailiff relayed the problem to the judge, who allowed all four still photographers in the courtroom for the remainder of the day. The extra two stayed only briefly, however, because the witness was not allowed to testify to the jury. There were never more than two photographers present in the afternoon.

There had been some problem the day before with the microphones on the counsel's table picking up defense counsel-client and co-counsel-counsel conversations. Apparently, if the volume of a home television set was turned up high enough, these conversations could be understood. The bailiff informed counsel of this fact.

One still photographer from the Capital Times brought as his backup camera a Leica viewfinder camera. Unlike the reflex cameras used by all other still photographers at the trial, this camera was extremely quiet and almost inaudible from a seat just in front of the rail. Apparently this type of camera has fewer moving parts.

At least 81 photographs were taken by the still photographers this day.

Wednesday, June 7, 1978

As court was convened, there were three TV cameras and cameramen present and four still photographers in the courtroom. After the defendant took the stand two still photographers left, leaving two in the afternoon.

While the defendant was testifying, his attorney objected to the fact that the defendant was being photographed with one of the exhibits (the paddle used in the alleged battery) in his hand. He objected, for the record, that the prosecutor had made his client pose in a manner "calculated for picture taking and improper."

After the noon recess, one TV cameraman finished setting up his camera after court was convened. Later, one of the TV technicians in the hall came in the court while in session and spoke to one of the cameramen. Both were warned about this later by the chief bailiff.

At least 135 photographs were taken by the still photographers this day.

In-court observation of the trial ended as the jury left for the final deliberation.

Judge William Sachtjen indicated that he delegated much of the responsibility for media problems during the trial to the chief bailiff. The following is a digest of an interview with the chief bailiff at the trial, Sgt. Gordon Butler:

"The rotation problem with the still photographers brought up the question of who has authority to decide the question of which paper gets a seat. The media coordinator should not be connected with any TV station or paper, to avoid problems of favoritism. More details should be provided as to how to deal with the problem of photographers from 4 competing local papers. They don't carry press cards, either, so it was hard to tell just who was authorized to take pictures. The media coordinator should issue color-coded cards for each trial to the media people.

"The TV cameramen should wear headsets hooked up to the technicians in the hall. This would avoid the problem of the technicians coming in to request a certain shot, which happened twice and was very distracting.

"There were problems with the conduct of the still photographers-- some laughed and made comments during the trial. We reserved the two front benches for the newspeople, including the photographers, but the guidelines should set out where the reserved area should be. It also should be clarified whether the still photographers can leave the courtroom to change film and lenses and then come back in. Some had deadlines to meet, so I told them that

they could leave but could not come back in. At another televised hearing this month, the photographers who were late for my instructions were not aware of the standards.

"Since the TV cameras have a long warm-up period, they were turned to the wall during recesses rather than turned off. However, the microphones should be turned off so as not to pick up conversations.

"With the exception of the still photographers trying to freeze each other out, the media people were very cooperative.

"After the verdict was in and court was adjourned, the media people and cameramen requested permission to conduct interviews in the courtroom. The judge granted it."

The following questionnaires were handled by Mr. Kodousek, and are reproduced here as he submitted them to the committee.

QUESTIONS TO BE ADDRESSED TO THE JUDGE

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record the name of the judge and how long he has served as a judge; also note which of the three media were used in the trial: (a) television cameras; (b) radio equipment; (c) still cameras)

**Judge William C. Sachtjen. All three media used in the trial.**

1. What, if any, influence do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on you during the trial?

**I was conscious of their presence, although I couldn't hear the camera shutters, for instance. They had an indirect effect in that a large courtroom with good acoustics was used, which made it easier to hear the witnesses. The cameras made me more aware of my posture, so I sat erect much of the time.**

2. Did the presence of (a) television cameras, (b) radio equipment, and (c) still cameras seriously increase your supervisory responsibilities?

**I delegated most of the responsibility to the chief bailiff, and I conferred with the media coordinator. The only serious problem was when four photographers (still cameras) from each of the four local papers wanted to get in, and I finally let them all in.**

3. If your response to question 2 was in the affirmative, did those responsibilities interfere with your principal duties as a presiding judge?

**No, a good bailiff handled all of it.**

4. Did the presence in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras produce more letters, telephone calls, et cetera, than you usually receive?

**No, there were some comments from acquaintances who had seen me on TV, but I don't get many calls or letters about cases anyway.**

5. What, if any, impact do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on the witnesses?

**They were more apprehensive, nervous, scared. The fact that it was a full courtroom with a lot of activity may have combined with the presence of the cameras to cause this.**

6. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the behavior of counsel?

**The cameras affected them in their unconscious actions, in the same way the cameras affected me-- little things like sitting up instead of slouching down.**

7. What, if any, problems occurred because of the use of (a) television cameras, (b) radio equipment, and (c) still cameras in your courtroom?

**No problems at all. The 5-year-old witness was scared, but it wasn't from the cameras.**

8. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

**No effect.**

9. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

**No effect.**

10. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**No effect in this case.**

11. Describe any requests you received for the prohibition of (a) television cameras, (b) radio equipment, and (c) still cameras, the action you took based on those requests, and the reason(s) for your action.

**I received no such requests.**

12. Overall, what is your general evaluation of the use of (a) television cameras, (b) radio equipment, and (c) still cameras, in the courtroom?

**Basically, I don't believe in them. If I were charged with a crime, I would not want it to be televised or photographed.**

**Everything went beautifully in this case, but this wasn't a serious enough case. There will be trouble with cameras in the courtroom in other cases.**

**If the defendant had been convicted, I would have been criticized for not sequestering the jury. As it was, they probably watched themselves on TV at night during the trial.**

**Defense attorney: Jack McManus, Madison**

QUESTIONS TO BE ADDRESSED TO COUNSEL

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Be sure to identify lawyers as to whether they were appearing for defendants or as prosecutors)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

**The still cameras were too loud, there was too much movement and jockeying for position by the still photographers, especially during dramatic moments when there was a distracting flurry of activity by the photographers.**

**The television cameras in the hallway outside followed the jurors entering and leaving the jury room, and I think that this had an undue influence on the jurors, giving them almost a celebrity status.**

2. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the strategy of litigation you intended to use?

**No effect on my strategy, although the prosecutor posed my client (holding an exhibit) for the still cameras.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the manner in which you examined or cross-examined witnesses?

**No effect; I was unaware of their presence while I was examining and cross-examining.**

4. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on your contacts or relationship with the judge?

**No effect on the relationship with this judge, but I can forsee problems with other judges.**

5. Did (a) television cameras, (b) radio equipment, and (c) still cameras result in producing more telephone calls, letters, etc., than you usually receive?

**I don't know. I ordinarily get a lot of calls because of the kind of cases I take, and this time was no different.**

6. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

**There was unnecessary filming of them when they were not in the jury box. This placed an undue influence on the jury, and they may have been caught up in the drama of the thing. The cameras, TV and still, could have affected their judgment and distracted them from their duty.**

7. What effect, if any, did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

**No effect.**

8. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

**No effect.**

9. Overall, what effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**No effect.**

10. If you had a choice, would you have preferred to try the case with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

**It made no difference in this case.**

11. What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

The still cameras had no benefit other than serving the public's need to know.

As far as television is concerned, if they become commonplace in the courtroom, they will act as a deterrent to incompetent attorneys whose knowledge of trial tactics won't meet the public or peer group scrutiny.

TV is an asset in that witnesses who know that their answers will be given wide dissemination will watch what they say. It also serves as an educational process-- the public will learn of the role of the courts, juries and counsel, and the uses of their tax dollars.

**Prosecutor, Assistant District Attorney (Dane Co.) Gerald Mowris**

QUESTIONS TO BE ADDRESSED TO COUNSEL

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Be sure to identify lawyers as to whether they were appearing for defendants or as prosecutors)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

   **The clicking of the still cameras was distracting.**

2. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the strategy of litigation you intended to use?

   **No effect.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the manner in which you examined or cross-examined witnesses?

   **No effect.**

4. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on your contacts or relationship with the judge?

   **I couldn't tell if it had an effect.**

5. Did (a) television cameras, (b) radio equipment, and (c) still cameras result in producing more telephone calls, letters, etc., than you usually receive?

**The nature of the case made it hard to determine if they had an effect.**

6. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

**I have no idea.**

7. What effect, if any, did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

**Probably no effect.**

8. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

**I have no idea.**

9. Overall, what effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**They had no effect that I could see.**

10. If you had a choice, would you have preferred to try the case with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

**Unless the shutter sounds could be muffled, I would prefer not to try the case with (c) in the courtroom.**

11. What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

The nightly replay was helpful.

My only concern with cameras is their effect on reluctant or frightened witnesses. Testifying in public is hard enough without putting their performance on television.

**Defendant and defense witness Pastor Wayne Dillabaugh**

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

**No distraction-- I did not notice their presence while I was testifying. I have become somewhat accustomed to the presence of cameras lately, but I was not distracted nor could I hear them while I was on the stand.**

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

**No effect.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

**It probably will result in more letters and phone calls, but I have been staying away from home during the trial.**

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

**It made no difference to me.**

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**Their presence made no difference either way , as far as I could tell, and made no effect on the veracity of the witnesses.**

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

**One problem was that the attorney-client conversations were picked up by the TV microphones at the counsel table, and this made it difficult to discuss anything with my attorney.**

**Detective Richard J. Miller, prosecution witness**

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

**No distraction. I didn't realize that they were there after I took the stand. I have testified before, and you're ordinarily nervous, but the presence of the cameras did not distract me or make me more nervous. I could not hear the cameras while I was on the stand.**

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

**No effect.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

**There was recognition the next day from people who had seen me on TV, but no harassment and no phone calls.**

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

**From a policeman's point of view, you're made more responsible for your actions-- you had better be sure of yourself before you take the stand.**

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**Because of the publicity it was hard to tell. In a regular case you could tell if it had an effect on fairness or not, but because of the nature of this trial, I don't know.**

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

**They don't distract, and their presence is a good influence.**

**Richard D. Hochsteader, defense witness**

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

**I heard the clicking of the still cameras, and it does disturb you when you're trying to think. The TV cameras had no effect.**

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

**No effect.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

**I expect some tonight. (Interviewed on day of testifying.)**

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

**They didn't have enough of an effect, they really didn't matter.**

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**They possibly will have an effect, but I don't know yet.**

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

**They had no effect on my testimony.**

**Kathleen Brandt, key prosecution witness.**

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

**There was no distraction-- I did not notice either the TV or still cameras at all during my testimony.**

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

**They had no effect, since I did not notice them once I was on the stand.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

**None received (as of one day after appearing on television).**

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

**It didn't bother me that the cameras were there.**

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

**They allowed both sides to be seen, by bypassing the news and allowing people to see the trial from start to finish. They made the trial more fair in that way.**

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

**I think that it's a good idea-- the TV cameras allow people to see the entire trial and decide for themselves.**

(2) THE McCOY MURDER CASE

For six days beginning April 24, 1978, Judge James W. Rice, then County Judge in Monroe County, tried a first degree murder case in the La Crosse County Circuit Court. Television and still photography were permitted throughout the trial. The chairman of the Monitoring Committee has had considerable correspondence with Judge Rice. On May 8, 1978, the judge wrote that he had asked the attorneys, the defendant, the jury, the witnesses and the Court Reporter "to be alert during the trial for any distractions the cameras may have caused. I received no complaints." When requested to report his experiences and impressions more fully, Judge Rice wrote in part as follows:

> "In response to your specific questions, there was no interference with my duties as a presiding judge. There was no effort by an attorney, a witness or any participant to play a little bit for the benefit of the cameras. I did feel that I made it a point to sit more alertly, and to be more selective in my choice of neckties each morning, but nothing more.
>
> "Were there any special problems? Only that I spoke to the coordinator prior to the trial as to location of the cameras and to remind them to remain behind the rail at all times.

"I cannot believe that the cameras had any effect on the length of the trial, its outcome or the conduct of counsel. I can believe that some attorneys would ham it up but they would have to be handled on an individual basis. Those involved in my case were professional always.

"I received no letters or phone calls regarding the trial, except from the news people. There is no question, however, that there was more conversation in the community than is normal. People spoke of the hardness of the defendant, the stupidity of a particular witness, of my stern demeanor (I don't think I was) and generally appeared much more interested.

"I have been in favor of cameras because I have felt they would give the public a better flavor of what goes on in a courtroom, rather than the picture TV now gives. I don't think it does as much as I had hoped. The total testimony of a witness, or the total argument of a lawyer, is not presented, just excerpts. This, of course, can only be changed by filming and presenting the whole trial and the commercial media people tell me that is not economically feasible....

"The experience was a success with only one or two very minor negatives. Once, a TV photographer had difficulty dismantling a camera and just once I heard a TV camera whining.

"I think one of the factors which made the experience unremarkable, was that one TV camera was in the courtroom all the time, but was operated only periodically. This, I think, allowed us to forget about it.

"The attorneys were well behaved and the media responsible. I think only good can come from that combination."

At the request of Judge Rice, Mr. Bill Hoel, News Director for WLCX, and media coordinator for the area, wrote to the Committee Chairman, and the following are some of his remarks on the televising of the McCoy murder case:

Coordinating coverage by the media was easy in this instance because of two factors. All local media had already cooperated in covering a nontrial hearing which took two days. This allowed us to get the bugs out of all systems, and to custom build some small pieces of equipment with which to distribute a sound feed to all who needed it. It gave us, secondly, a known quantity, if you will, to present Judge Rice. We were able to respond to his questions about how we'd work in the courtroom with definite answers, because we'd already had experience.

I daresay the fact that Judge Rice is liberal in applying the Supreme Court Guidelines was a major factor in the successful coverage, also. I am of the belief the guidelines are far too

> strict in their construction. They set very tight limits in an area where cooperation between all media is not always available. Judge Rice waived the rules governing number of cameras. Because of this, there were still only three cameras in the courtroom, but two of them were of the same type (film), while only one was of the electronic "TV camera" type.
>
> Our standard mode of operating when in the court was a very low profile. Outside of the presence of three cameras in the far corner of the room, a jury member would have had a hard time distinguishing the rest of the reporters from normal courtroom observers. We use small, portable cassette recorders for radio. These can be held in the lap, and turning them on or off creates no noticeable noise.
>
> Once an hour, radio reporters get up, leave the courtroom, and file their stories for that hour's newscasts. This activity is staggered, so it is not a mass movement, which might be distracting.
>
> All in all, I saw the jury distracted from their concentration on testimony perhaps once or twice during the entire proceeding; and only one or two jurors at each of those times. This doesn't prove any theories, or make any points. It does show me, however, that given proper facilities in which to operate, the media can be a very low profile presence in the courtroom.

At the conclusion of the trial, Judge Rice asked each juror to write him a letter explaining what, if any, effects the cameras had on them. All of the jurors responded. One juror wrote: "I would just as soon see cameras in court discontinued. It was neither a good or bad experience for me." He also said that his wife received a number of calls on seeing him on television, and he expressed the fear that in some cases those could be crank calls. All of the other jurors wrote, in one way or another, that the cameras in the courtroom did not have a distracting impact upon them. Here are some sample comments: "The fact that the trial was televised did not bother me. I was hardly aware they were in the courtroom." "From my own personal experience I would say it did not bother me because I was intent upon trying to hear every single word that each person had to say concerning the case at hand." "The cameras in the courtroom made no difference to me as a juror in the McCoy trial....In listening and concentrating on what was said and presented in evidence, I'd forget the TV cameras and news media were present in the

courtroom." But this juror was apprehensive that the presence of cameras might make witnesses less willing to tell what they know. Another juror wrote: "In my case, it did not interfere with my concentrating on the McCoy trial and I wouldn't be opposed to being on another case which had cameras in the courtroom." Still another wrote: "The cameras in the courtroom during the McCoy trial were no distraction whatsoever as far as I am concerned." Another juror added the thought that he felt that it was "very good" to have cameras in the courtroom, and that he was unaware of them most of the time. Still another reported that the cameras "did not bother" her, and that during most of the trial she was not aware of their presence in the courtroom. Finally, another juror observed that while she was aware of the cameras, they had "little affect" on her; she said that she did not find the cameras distracting, and that she could not detect any impact upon anyone involved in the trial. She also wrote: "I feel that if the cameras in a Court Room can in any way educate the public about our judicial system and make people aware of it's impact in our community, it is certainly a plus for everyone."

(3) TRIAL OF RICHARD TODD BUCK

This criminal case was tried before Circuit Judge M. C. Holz and a jury in the Circuit Court of Milwaukee County. This summary is based on the written observations of the committee's observer, Mr. James H. Kaster, of Milwaukee. The trial ran from July 18 to July 24, 1978. The case involved various sensitive issues. The victim of an alleged second degree murder was a physician with an outstanding reputation in the community. The defendant claimed that the Doctor had subjected him to a homosexual rape attempt, as a result of which, in the heat of passion, he grabbed a kitchen knife and stabbed the victim to death. The defendant's main position was that the crime, if any, was manslaughter, and not murder in the second degree.

The jury was chosen in an extensive two-day voir dire examination, and one of the questions put to the jurors was whether they felt that the use of cameras would affect their impartiality adversely. Those who served on the jury responded to that question in the negative. There were no cameras or radio equipment in the courtroom during the voir dire. Defense counsel James Shellow stated to our observer that he intended to challenge the use of cameras in the courtroom on the ground that it would be injurious to the defendant, in that it would have a negative effect on the impartiality of the jury and the effectiveness of counsel. The jury was sequestered until it reached its verdict.

During the trial, the television cameras were in plain view of the jurors, the judge, counsel, and the general public. Both defense counsel and the judge stated that they preferred to have the cameras in a less conspicuous place. Defense counsel claimed that several jurors were distracted by the cameras being in open view. On the other hand, the prosecutor, Mr. William Sosney, said that he preferred a small camera used openly, rather than a large stand-up camera placed in a back room out of the immediate view of the jury.

Though the trial attracted tremendous interest in the community, involving the death of a prestigious doctor, and very sensitive issues of rape, homosexuality and drug use, the coverage was low-key, and the media were content simply to present the public with but a few significant moments of the trial, such as the opening arguments and the testimony of an important witness. The trial was not covered in its entirety. There was full coverage for the closing arguments, but our observer noted that even so, there was little, if any difference between that day's proceedings, and the proceedings on days when no cameras were

being used in the courtroom. He observed that "the jury seemed completely unaffected. I never noticed any juror turn his head toward the camera. Counsel also seemed unaffected; yet Mr. William Sosney later reported that the cameras made him 'more nervous than usual.' The judge, although it was apparent that he was aware of the presence of the camera, appeared unaltered." During the final argument, defense counsel Stephen Glynn made an issue of the use of cameras; he referred to the fact that others watched parts of the trial on television, and admonished the jury not to be afraid that their verdict might be criticized by viewers. The prosecution made no reference in closing argument to the use of media devices.

Our observer concluded that, "in my own subjective opinion, the cameras did not affect the fairness of the proceedings. The jury was unconcerned, and, I would say, unaffected. Yet, counsel for both sides claimed that they preferred not to have cameras in the courtroom. The judge managed his extra supervisory responsibilities well. The jurors interviewed all agreed that the cameras, etc., had no affect on them. Although they were aware of the presence of these media devices, they claimed it did not alter their deliberation or final decision. My observations support their claims. Judge Holz, however, claimed that the cameras simply add an extra burden on the judge in an already difficult situation, for example, an important murder trial....The defense and prosecution both agreed that they would rather try a case without cameras in the courtroom. Their rationale, however, differed. The prosecutor claimed that media coverage puts the trial in the public eye. For that reason, he claimed, the jury is reluctant to return a harsh verdict. He further complained that camera use automatically gives defense counsel an issue for appeal. Defense, on the other hand, claimed that the notoriety of a covered trial makes the jury more reluctant to return a lenient verdict. According to them, jurors fear the peer pressure resulting from a lenient verdict more

than any pressures resulting from a harsh one."

In response to the queries set out in the prepared questionnaire, the judge expressed the opinion that the use of cameras "is overly disruptive, especially in a difficult case where the judge already has immense responsibility." At the same time, the judge indicated that the added responsibilities did not interfere with his principal duties as a presiding judge. In response to the questions as to whether the use of cameras resulted in more letters, telephone calls, etc. than he usually receives, the judge responded, "definitely." He also thought that the cameras have "a noticeable effect" on the witnesses. In addition, he expressed the belief that the presence of the media in the courtroom had some effect on the behavior of counsel in that they seemed to be more "solicitive of the press so as to have 'their' story told." He stated that the use of cameras did not affect the length of the trial, its outcome, or its fairness. Asked for a general evaluation of the matter, Judge Holz replied: "The use of media devices in the courtroom makes the tasks to be performed by the judge more difficult in an already difficult situation. It upsets the flow of the trial. Further, the state is forced to bear the burden of added expense, such as is caused by sequestration."

Our observer was able to interview 4 jurors. All agreed that they were aware of the presence of cameras in the courtroom. All 4 stated that the cameras had no effect on their deliberations, and that none received phone calls or letters during or after the trial because of the use of cameras. In reply to question as to whether the cameras had any impact on the behavior of the witnesses, all replied, "I don't know." All 4 agreed that they did not believe the cameras had any effect upon the behavior of counsel, or of the judge, or on the fairness of the trial. Asked whether, if they had a choice, they would have preferred to be on a jury with or without cameras in the

courtroom, all 4 declared that they had "no preference," although one of them said that "a murder trial should be a private matter, especially in such a sensitive situation." (Of course, this juror did not seem to understand that no criminal trial is ever a private matter, and that public trials are guaranteed by the Constitution.)

In his responses to the questions put to him by our observer, defense counsel Shellow asserted that the presence of cameras in the courtroom distracted him from the tasks at hand during the trial "regularly." As to whether the presence of cameras affected the strategy of litigation, Mr. Shellow declared that "it affected the basic decision of whether we would have the defendant take the stand in the case." He also expressed the opinion that the cameras had "an obvious effect on one witness,...who was extremely distraught while testifying in front of the cameras." While he conceded that there was a potential for theatrical antics by the judge, he said that the judge conducted himself very well and appeared unaffected by the cameras. Mr. Shellow noted that the use of cameras did not produce more letters, telephone calls, etc. than he usually receives, but as to whether they had any effect on the jury, he responded that it is "difficult to say." He did not believe that the cameras had any effect on the length of the trial. At the same time, he thought that "it is possible that the jury may have come back with a not guilty verdict had the cameras not been used." Our observer points out that defense counsel did not argue for a not guilty verdict at any time during the proceedings, and that the verdict of manslaughter rather than second degree murder was regarded as a victory for the defense. When asked whether he thought the use of cameras had an effect on the fairness of the trial, Mr. Shellow responded, "Certainly. Prosecutor Sosney was obviously responding to camera use during the trial." Finally, Mr. Shellow indicated that he would have preferred to try the case without cameras in the courtroom,

asserting that the practice "unfairly prejudices the jury. Distorts fact finding. Only one juror during the voir dire was candid enough to admit that the cameras might have affected him. The others were 'less than candid,' when they claimed their use would have no effect."

In his responses, defense counsel Glynn said that the cameras distracted him "on occasion," that the presence of cameras affected the choice of exhibits offered into evidence, because of the sensitivity of matters at issue, and he declared that "we changed examination strategy" because of the presence of cameras in the courtroom. He also said that the cameras did not affect his contacts or relationships with the judge, but that he did receive more office calls and calls from television stations than usual. He said that he did not know whether the cameras had any effect on the jury, but he added, "I noticed that one juror was distracted by a TV camera when it was allowed out into the open court room." While in his judgment the cameras did not affect the length of the trial, he added , "I am afraid that it may affect the outcome," when asked about this before the verdict was reached. Asked whether the cameras affected the fairness of the trial, he responded, "I don't know." Finally, asked about his overall preference, he replied: "I would prefer that they not be allowed into the courtroom; however, if they are allowed, I would prefer that their use not be revealed to the jury. Such use of cameras, however, may violate privacy rights of individual jurors." At the same time, he conceded that there may be "theoretical" advantages. For example, a judge normally belligerent to a defendant might be moved to maintain a more objective demeanor. Overall, however, there are more disadvantages than advantages."

Mr. W. Sosney, the prosecutor, said that the cameras made him feel "nervous- more than usual." But he did not think that the presence in the

courtroom of cameras affected the strategy of litigation, or the manner with which witnesses were examined or crossexamined, or his contacts or relationships with the judge. On the other hand, he noted that "more people contacted me to talk about the case than usual," and when asked about the effect of the cameras on the jury, he responded: "It is difficult to speculate on that. Yet, the defense used reverse psychology with the jury. They attempted to get the jury to over-react to the possibility that they might feel pressure to convict. By doing so,....they may have successfully made the jury overly reluctant to convict." Mr. Sosney did not believe that the use of cameras had any effect on the length of the trial, but when asked whether it had any effect on the outcome of the trial, he responded: "It is difficult to speculate. Yet, jurors must feel unusual because of the uniqueness of media coverage." In response to the question as to whether the cameras affected the fairness of the trial, the prosecutor replied: "If anything, it is unfair to the state's interest and to the people of Wisconsin. The cameras made conscientious people reluctant to pull the trigger." Asked whether, if he had a choice, he would have preferred to try the case with or without the cameras in the courtroom. Mr. Sosney replied: "The use of cameras is not only unfair to the people of Wisconsin, it adds an unneeded expense to the trial of cases. For example, the jurors were sequestered in this case, when they otherwise would not have been." Finally, in response to the query as to whether the use of cameras had any overall advantages, our observer quotes the prosecutor as follows: "None. There is not a need for the extra coverage allowed by the use of cameras. The media are there only to present sensational issues to the public, not to satisfy the public's need to know. This is well illustrated by the manner in which the cameras have been used up to this time."

(4) THE CASE OF FILEMON AMARO

Accused of first degree murder and abduction of a hostage in a stolen vehicle, Mr. Amaro was put on trial before a sequestered jury, in Waukesha, on November 27, 1978, with Judge Max Raskin presiding. Public television channel 36, with the full approval of Judge Raskin, broadcast the entire trial live after the jury had been selected. According to a news story written by John Schroeder for the Waukesha Freeman, November 10, 1978, Judge Raskin adopted the following guidelines for this particular trial:

> "The cameras can focus on trial witnesses only momentarily. Raskin said he wants to avoid making the witnesses anxious.
>
> "No closeups of jurors will be allowed.
>
> "The camera is to be placed at the rear of the courtroom to avoid blocking spectators' views.
>
> "Reporters won't be allowed to speak during the trial. That includes a ban on talking even quietly into a microphone."

In a news release dated November 13, 1978, Channels 10/36 noted:

> "Both Judge Raskin and 10/36 General Manager Otto Schlaak, feel that televising this trial is in the interest of the public for the following reasons: it will demonstrate exactly how the court system works, and show the complexity of a murder trial in which the defendant is assured and guaranteed his right to a fair trial. This trial should also prove to the public one of the basic tenets of the American judicial system, that the defendant is presumed innocent until proven guilty."

Furthermore, 10/36 Program Manager, Don Burgess was quoted as follows:

> "We are committed to stay with the trial as long as it lasts and we will not, during the trial's duration, editorialize, opinionate (sic!), or analyze the effects of what happens. We will only televise and report the event as it happens."

Since Mr. Amaro was a Spanish American, some members of Milwaukee's Spanish community protested the televising of the trial, on the ground that it would have the effect of stirring up group prejudice, and tend to reinforce a sense of stereotyping against the Spanish community as a whole. Responding to such complaints, Dr. Schlaak pointed out that while he recognized that at

least part of the Spanish community had honest concerns about the impact of broadcasting the trial, "we would have a very hard time finding any trial where the person being tried didn't reflect on some portion of the community." He also noted that the Milwaukee Sentinel reporter who covered the Amaro case "formed the impression that the two cameras...had little or no effect on the attitudes and demeanors of the participants. The reporter said that he saw no 'camera glances' by anyone involved in the case. He said that with the red 'on the air' lights disconnected and a minimum of movement while 'panning' from one side of the courtroom to another, both cameras were very inconspicuous. Generally, the reporter said, everyone involved forgot that the cameras were present." (Milwaukee Sentinel, December 1, 1978).

Editorial opinion in responsible newspapers in the area rejected the notion that the televised trial involved an ethnic slur. In an editorial published by the Milwaukee Journal on November 30, 1978, it was noted that there was great public interest in the trial because of the unusual nature of the incident in June which led to the trial. "We think that fact, rather than any effort to highlight alleged deviant behavior on the part of Hispanics, led to the choice of this case for live TV coverage...No reasonable viewer is likely to be swayed by racial or ethnic bigotry as a result of watching the trial on TV. The unreasoning bigots among us doubtless would hold their prejudices if these proceedings were sealed." The editorial went on to argue that while minorities are fully justified in saying that media images are often negative, the remedy lies in insisting on balanced coverage, but that "it does not lie in an ill-advised effort at restraining the flow of information."

In addition, an editorial published in the Waukesha Freeman on November 28, 1978, took the position that the Amaro trial was not singled

out for televising because the accused was of Spanish extraction; it merely happened that this trial was the first involving a murder charge in the area since judges in Wisconsin were first given permission to allow television cameras in the courtroom. The editorial also noted that almost every defendant could make similar objections on such grounds as nationality, sensitivity or an alleged right to anonymity. "The judicial system depends for its credibility and the protection of those brought before it on the principle that proceedings shall be open to the public. To tamper with that requirement can only be detrimental to our system of jurisprudence and the philosophy supporting it." In an editorial published on December 11, 1978, as the trial was drawing to an end, the Freeman expressed the opinion that "it can be said without arguments to the contrary that the experiment of television in the courtroom has successfully passed its first critical test in Wisconsin." The editorial argued that the experience disproved all of the old objections, such as the danger of distracting from the essential dignity of the court proceedings, the distraction of witnesses, the degrading of the court, or the creation of misconceptions in the mind of the public.

Similarly, an editorial published in the Racine Journal Times on December 12, 1978, pointed out that "the Amaro case was not singled out for television because the accused happened to be Hispanic. There has been considerable public interest in the proceedings because of the shocking nature of the crimes." It also noted that Channel 36 "has taken pains to avoid turning courtroom drama into a carnival atmosphere." It concluded with the observation that "as long as news photographers are discreet and don't interfere with the proceedings, they should be allowed in courtrooms so the public can get a better understanding of our system of justice."

In a letter to the committee dated January 9, 1979, Judge Raskin made the following comments about the inferences he drew from his experience with the Amaro case:

From this experience I draw the following conclusions:

(a) I found the placement and use of the two cameras in the courtroom to be unobtrusive, not to have distracted trial participants and not to have interfered with the progress or process of the trial under the guidelines previously established by the court.

(b) No editorial or critical comment was permitted to be made by channel personnel from court premises.

(c) Two problems arose with respect to witnesses refusing to be televised while testifying. One was a witness for the state. The District Attorney asked that the cameras be turned off while he is testifying for the reason that he feared for his life. In view of the fact that this witness was under a criminal charge and was about to be tried, I believed that compelling him to testify with the cameras turned on might interfere with the state's prosecution of that witness on an unrelated charge.

The second instance arose when the defendant who had entered a plea of not guilty by reason of mental disease or defect, and who had already been found guilty by the jury in the first phase of the trial; said that he would refuse to testify in his own behalf during the second phase if he was to be televised while testifying.

In order to avoid a constitutional issue I agreed that while he is testifying the cameras were not to televise him. He testified and no further complications arose.

(d) All witnesses except expert witnesses relating to the mental condition of the defendant were sequestered. This presented the problem whether any witness was watching the telecast away from the court house before being called to testify. I informed counsel that any witness may be voir dired outside the presence of the jury with respect to whether a witness listened or watched other witnesses when testifying. No such requests were made.

(e) The above situation could become a problem and my recommendation for the future would be that all lay subpoened witnesses including police officers receive a written order from the court banning them from listening to other witnesses testifying, provided such a request is made by counsel. The fact that a witness who violates the order may not be permitted to testify would tend to insure enforcement of the order.

(f) Throughout the trial I did not permit any inquiry by counsel touching upon the subject of the presence of television cameras. My position was that the presence or absence of cameras should not be made a subject of controversy or comment in the presence of the jury. I looked upon the presence of the cameras as pieces of equipment and no different than the presence of a newspaper reporter sitting in court and making notes.

(g) Of significance was the fact that I directed channel personnel that the red beam lights in front of the cameras indicating that the particular subject was being televised were to be turned off. This in no way affected the televising process and at the same time gave no indication to the witness or anyone else that the camera was in use.

(h) From my observations I could detect no impact upon Jurors, Witnesses or Counsel by reason of the presence of the television cameras. Nor was there any adverse impact upon the defendant, other than what was noted previously.

(i) I found the administrative responsibility in moving the trial along no different than any other times. I experienced no burden with the television cameras being present in court.

(j) There was complete cooperation from all television and channel personnel.

(5) BAIL HEARING OF RAY MENDOZA

This hearing was held before Circuit Judge Robert W. Landry, on September 15, 1978. The issue was whether Mendoza's bail money should be forfeited as a result of Mendoza's alleged violations of conditions relating to his trial. Audio and visual material were used in the courtroom; two cameras were used, one being carried and the other being permanently stationed in the back of the courtroom. According to the committee's observer, the stationary camera was out of the immediate sight of those within the courtroom, and thus presented no problem of distraction. The carried camera, however, presented more of a problem. The cameraman carried the camera into the courtroom, before the judge arrived on the scene, to shoot a close-up of defense counsel James Shellow. He also shot a close-up of those members of the Mendoza family who were present, and our observer records that they were "noticeably uncomfortable as a result." There being no jury, our observer noted that it was

difficult to assess the impact of the media. "The professionals (the judge and counsel) were apparently unaffected. Some of the camera techniques were potentially objectionable; yet the fairness of the proceeding was untarnished."

The committee observer was able to interview both Judge Landry and assistant district attorney T. Hammer. Judge Landry, who has served on the bench for over 24 years, responded to the questions put to him with commendable candor. Asked whether the cameras exerted any influence on him, he responded: "None that I am consciously aware of. Everything is on the record anyway. I really don't consider that publicity makes a difference, since our trials are already public proceedings." But Judge Landry also pointed out that as a result of the presence of cameras in the courtroom, "there is an increase in supervisory responsibilities. Yet, once the newspeople get used to your guidelines, the procedure is self-executing." Asked whether the additional responsibilities interfered with his principal duties as a presiding judge, he replied in the negative. In reply to the query as to whether the use of cameras produced more letters, phone calls, etc., he replied: "None- at least I have never had that problem in the past." Asked about the impact of the cameras on witnesses, Judge Landry replied: "I think it does make the witnesses more nervous at first. However, the effect becomes considerably diminished as the testimony of a witness continues." As for the behavior of counsel, the judge observed: "There is probably what I would consider a small effect on counsel, which might make them more theatrical." Judge Landry was asked whether problems occurred because of the use of the cameras, and he replied, "None", and he gave the same response to the question as to whether the length of the trial was affected. He also declared that the use of cameras had no effect on the outcome of the proceeding. He explained: "Under the controls as presently prescribed by the Wisconsin Supreme Court,

the possibility of abuse is minimal. However, if the media violate the rules, they could affect the outcome. For example, I know of an incident in Judge Barron's courtroom where, contrary to specific instructions by the judge, the media reported the jurisdictional award to the public. Even considering such potential for abuse, I still do not favor prohibition of news coverage in the above forms."

Judge Landry was asked whether he had received any requests to prohibit the use of camera and sound equipment in the proceeding. His reply was as follows, as recorded by the committee's observer: "In the Mendoza trial, both state and defense counsel vigorously argued that television not be allowed in the proceeding. I denied the request. That denial was appealed to the Wisconsin Supreme Court, and affirmed. Application is presently before the United States Supreme Court on the same issue. I denied the request because I felt that the Wisconsin Supreme Court had made a policy decision to allow cameras and other media in the courtroom, and that therefore, they should be allowed in the great majority of cases." Asked for an overall judgment, Judge Landry responded as follows: "Overall, I am favorably disposed to media presence. I feel the public has a right to know what is happening in a courtroom. However, I wish that the media would attempt to present a more objective picture of what is happening in the courtroom. The public should be proud of the good job that the courts are doing for them. However, when the public only sees the sensational issues being presented, they get a perverted idea of what is happening in the courtroom."

Assistant district attorney Hammer, responding to the question as to whether the cameras exerted a distracting influence upon him, replied in the negative, but added, "However, since this was a non-jury hearing, my answer does not reflect my true attitude toward camera use." He said that the use

of cameras in the courtroom did not affect the strategy of litigation he intended to use, and did not have any impact on his contacts or relationship with the judge. As for the impact upon the manner of examining or cross-examining witnesses, Mr. Hammer said, "There was an effect. I refrained from asking questions I otherwise would have asked because part of the proceeding was to be seen on T.V." Whether he received more letters and telephone calls than usual, he replied that "it is impossible to say right now, immediately after the proceeding." Mr. Hammer said that in his judgment the use of cameras did not affect the length of the proceeding or its essential fairness. Asked if he had an overall preference, he replied: "I would try a case without cameras. Witnesses have a tough enough time responding to the normal pressures of the courtroom without the added pressure of publicity. Furthermore, it is distracting for all involved." Finally, when asked whether he saw any overall advantages in the use of cameras in the courtroom, Mr. Hammer replied: "If the entire proceeding were filmed, the films could be used as a training technique for law students. However, erratic as the coverage is, it serves no useful purpose whatsoever."

(6) THE SENTENCING OF ROXANNE STEVENS

In October, 1978, Roxanne Stevens, on a no-contest plea, was convicted for neglecting her children, two of whom suffered smoke inhalation and died after a fire in their apartment. Cameras were permitted during Stevens' initial appearance in September, and at a session on October 11, when she waived preliminary hearing, pleaded no-contest, and was found guilty by Circuit Judge Clarence W. Nier of Brown County. On motion of her counsel, however, the cameras were banned from the courtroom for the sentencing. The following excerpts from a lengthy account of this matter written by reporter

Ellen Zettel and published in the Green Bay Press-Gazette on November 19, 1978, explain what happened:

> A victim of telephone harassment, the woman has alledgedly suffered from the publicity her case has brought. She has been embarrassed and ridiculed. With television and still cameras focusing upon her at the sentencing, she might be reluctant to speak on her own behalf.
>
> Her attorney, Geoffrey Dowse of Wisconsin Indian Legal Services, claims that "the presence of audio and visual equipment in the courtroom has previously caused her great mental anguish and has subjected her to undue public scrutiny."
>
> As a result, the equipment will be prohibited from the courtroom upon the order of Brown County Circuit Judge Clarence W. Nier, who will preside during the sentencing of the 23-year-old mother.
>
> News professionals, however, have some trouble understanding the reasons for the ban. This is one instance of the media's attempt to define what constitutes "reasonable cause" for prohibiting audio-visual equipment during this trial period of access to the courtroom, which started April 1 and ends March 31, 1979.
>
> Dowse requested the ban on audio-visual equipment from the courtroom on Oct. 17. He has nothing against cameras being set up outside the courtroom-- "just not while we're in there.
>
> "Sentencing is so important," he explains. "Any feeling of unease is going to influence how I argue for sentencing and it's going to influence Roxanne if she's going to make a statement."
>
> Cameras were permitted during Stevens' initial appearance in September and at a session on Oct. 11 when she waived her preliminary hearing, pleaded no contest and was found guilty by Nier.
>
> The attorney says that the presence of cameras works to destroy "personal" quality of an appearance before a judge for sentencing. "Sentencing is a one-on-one thing between a judge and a defendant," he says.
>
> Nier says he granted Dowse's request as the presiding judge in the Stevens case "because her attorney pointed out to me that she had great exposure at the time she waived her preliminary hearing, and as a result of that exposure, if cameras were in the court at the time of sentencing, she might decide to stand mute. I would want her to tell me her story."

Nier and Dowse say they respected Stevens' wishes "to stay as much away from the public as possible."

According to Dowse, "Roxanne has been living in a fishbowl ever since this happened last summer.

"She had some phone calls from people in our community that called her a murderer," he explains. "These phone calls came from pretty sick people who consider her sick."

Dowse says his client has not complained about annoying phone calls lately. Most of the calls were apparently provoked just after news of the fire and the subsequent deaths of the two children was reported.

He adds that Stevens has been living in Oneida with her mother, who has been in poor health and was hospitalized shortly after the incident. Her mother was terribly shaken by some of the phone calls which she answered.

"The media in general made such a big story of the case that it has been almost impossible for Roxanne to live a normal life," he says.

Dowse stresses that he thought that photographers and camera operators "did a good job last time." He feels that, for the most part, they abided by the state Supreme Court's guidelines regarding audio-visual equipment in the courtroom.

However, he points out the instance when a television camera operator "chased Roxanne down the street" just after her last court appearance.

There seems to be no question among news personnel that reasons such as the fear of physical harm or of undue embarrassment serve as just cause for banning cameras from the courtroom. But they hesitate at allegations that the defendant may not be able to speak in his or her own behalf with cameras present.

Charles Leonard, news director at WBAY-TV and media coordinator for the 8th Judicial District, says he felt the reasons given for the ban-- namely, that the defendant suffered "great mental anguish" and "undue public scrutiny"-- are "a little foolish."

He notes that cameras were permitted at Stevens' two previous court appearances. "It seems to me that barring the cameras from the courtroom is like closing the door to the barn after the cows have escaped," Leonard says, adding that he is speaking as a journalist and not as the media coordinator.

Leonard says the fear that Stevens might stand mute is "Probably a fairly valid cause" to ban cameras. "You would have to know the individual before you make that kind of judgment, but there are people who just can't talk before a camera."

He adds that Nier, as chief judge of the district, has been "quite supportive" of the media in their attempts to bring cameras into court. "He's been very good to us."

(7) OTHER PROCEEDINGS

Wisconsin Bankers' Assoc. v. Mutual Savings & Loan Co.

This case involved the use of cameras in a court of appeals. Oral argument was heard on September 25, 1978. In this instance, Judges Decker and Cannon presided. The case involved the use by savings and loan associations of sight drafts. According to the banks, this practice constituted an infringement on areas traditionally reserved for banks.

The committee's observer made the following comments:

"The attorneys made their arguments without ever looking at the cameras set up in the back of the Court of Appeals. While one was busy speaking, the others were preparing rebuttal to what was being said. Although Attorney Brody appeared nervous, it was difficult to determine whether the camera was the source of his hesitant manner.

"The judges involved, Judge Decker and Judge Cannon, also appeared unaltered by the camera presence. They were engrossed in the argument being presented. It would seem that in a proceeding of this nature - without a jury - they could more easily disregard the media activities. Their supervisory responsibilities seem lessened immensely when there is no possibility of jury prejudice.

"As Attorney Friedman told me after the proceeding, the camera presence has little effect on trial attorneys and judges. They are hardened to publicity and accept it as an every-day occurrence. It is only when a jury is present that prejudice will possibly result."

Observations from Circuit Judge Peter G. Pappas of LaCrosse

Circuit Judge Peter G. Pappas, who sits in the Circuit Court of LaCrosse County, wrote a letter to the chairman of the committee on May 9, 1978 recounting some of his experiences with the media people and expressing several opinions about the use of cameras in the courtroom. Portions of this letter follow:

"At the time that the rules were announced by the Supreme Court, there was pending in my Court a court matter involving annexation of a portion of the Town of Medary by the City of La Crosse which had great interest in the community and the first hearing was scheduled for March 29th, 1978 and even though that was prior to April 1st, I felt that, in view of the fact, that a jury would not be involved, that would be an excellent opportunity, to allow radio and T.V. into my Courtroom for the first time.

"I met with the media representatives and they made arrangements for the placing of their equip ment, etc., and frankly, I felt that it went very well. There was no posturing by the attorneys, as a matter of fact, very soon after the trial started, I think that we were all pretty well oblivious to the presence of the media.

"There was a subsequent hearing on April 18th, 1978 and it also was covered by the media, although not to the extent that it had been covered the first time. Again, there was nothing unusual that happened, and no problems posed insofar as conduct of the trial was concerned.

"Early in April there was a trial involving charges of Soliciting of Prostitution and Keeping a House of Prostitution, and although the media had evidenced some interest in it, the only coverage was a newspaper photographer coming in and taking some still shots and one of the T.V. reporters came in with a hand-held camera and took a few pictures. Prior to that trial, I had had some indication that this particular reporter was coming in because she had approached me and told me that she would be coming in and wondered if I had any objections. I had told her that I had no objections except that I did not want any pictures taken of the State's undercover agents. No objection was raised by the reporter to this and, as a matter of fact, she went out of her way to make certain that she did not get any shots of the undercover agents. She even went so far as to delete part of her film when she discovered she had the backs of the heads of two of the agents which had gotten into her picture because of the scope of the lens.

Since then, they have come in on an occasional basis, although I have not had the same set-up of equipment that they had at the March 29th hearing....

"So far, the only media that we have had interested are the two local television stations, the Television Department of Western Wisconsin Technical Institute which has a connection with cable television and then the three local commercial radio stations plus the University radio station.

"When the jury was present for the trial I have referred to, they did not seem to be at all aware of the fact that there were

any photographers in the Courtroom taking any pictures. As I was observing them closely, their attention did not go from the witnesses and the attorneys to the back of the Courtroom to be curious as to what might be going on.

Our local media people, even though very competitive, have been very cooperative and responsible. Now, this attitude might change if the rules are eventually changed so that their admission to the Courtroom will be more or less a matter of right, rather than on a trial basis, as at the present time, but I do not anticipate any problems that cannot be handled. I could foresee if we had a trial which was so notorious as to bring in network people, and if that should ever happen, then I am quite certain that the Court would probably have to lay down some pretty tight rules because otherwise, I have no doubt that they will do anything at all possible to gain some sort of competitive advantage.

As the year goes on, and if I have any additional experience which would lead me to come to a different conclusion, I will certainly let you know. But at this point, I see no problems attendant to allowing cameras, radio, and television into the Courtroom."

A Fire and Police Commission Hearing

On July 5, 1978, Mr. William A. Adler, an attorney in Eau Claire, and a member of the committee created to monitor the use of photography in the state's courtrooms, wrote a letter to the chairman of the committee regarding his experiences with the media. Since his account and observations have a direct bearing upon the problems confronting the committee, the letter is herewith reproduced in full:

"I have just completed a highly publicized Fire and Police Commission trial that covered a period of some seven weeks. The hearings were conducted in the Altoona High School Gymnasium with spectator crowds of from 200 to 300 people filling chairs set up on the gym floor and bleacher seats along the walls. The commission members, counsel and principal parties, including court reporter, were all seated at a table grouping out on the gymnasium floor. There were times when the crowd reaction was quite disturbing -- on one occasion to the point where the president of the Police and Fire Commission announced that he was going to move the hearing to smaller quarters. With adequate warning the crowd became somewhat subdued at later hearings.

"In this atmosphere there was constant monitoring by representatives of radio, television and the news.

"The television cameras were moved from point to point in the hearing room and the camera itself was backed up by a bank of several rather high intensity lights. The intensity was such that the commission members complained of the lights shining in their face on at least one occasion.

"Around the table where the commission members, attorneys, etc. were seated, were several microphones. The floor in the area had many wires from the audio and tv equipment.

"During the course of the trial, radio and media people would place hand-held recording devices on the tables and in proximity to the witnesses to record what was being said.

"In short, the entire atmosphere was violative of practically all of the standards for maintaining decorum that have been set up by the Court for the year study period. Of course, this was not a court hearing, it was a commission hearing.

"Because of my membership on your committee, I was interested in what my personal reaction would be to the presence of the media and I also made inquiry of some of the witnesses and other parties involved.

"My own reaction was that I was almost completely oblivious to what would be considered a very distractive atmosphere. I recall having to watch my step when handling exhibits so that I didn't trip over some of the wires strewn around the floor. I recall several instances when I was giving a somewhat prolonged address to the members of the Police and Fire Commission that I had to adjust my position, at the direction of the media people, so that I was either in line with the television camera or I didn't block the television camera's view of what was going on. I recall that there was some distraction resulting from either inoperation of the microphones or my not being in a position to be picked up properly by the microphones and the various recording devices. However, these distractions, I did not feel, affected my presentation of my client's case.

"Considering the exaggerated atmosphere I was in and relating that atmosphere to what we would hope to find in the courtroom in a proceeding that complied with the rules that have been set up, I do not feel that camera noise and the other possible areas of distraction set forth in the Dillabaugh report would have affected me.

"As far as the reactions of witnesses, commission members, etc., they indicated an initial awareness of the media and media equipment but did not feel that their presence had any particular affect on them as far as giving their testimony or the nature of their testimony. In other words, their awareness appeared somewhat transitory and once they began answering questions, they seemed to be oblivious to the effect of media.

"As to the overall effect on the hearings themselves and the people who had to make the ultimate decision, this would be extremely difficult to evaluate since the matter was quite emotional, was highly publicized, and, the overall psychological impact would be impossible to evaluate at this time.

"I send you these comments for purposes of allowing the committee to contrast a completely uncontrolled situation with the court cases that will be reviewed under controlled, restrictive circumstances."

Case of Larry Solles and Steven Drenning

Solles and Drenning were convicted in August, 1976, in Rock County, of the shooting death of a gas station attendant in Janesville, and given the maximum sentence of 60 years. At the hearing for a new trial, Judge Gerald Jaeckle ordered cameras and tape recorders out of the courtroom, on motion of the public defender's office. This was reported in the Janesville Gazette for April 11, 1978, but no reason was given in the press account for the judge's order.

Case of Barbara Hoffman

At the arraignment on a charge of murder, in the Circuit Court for Dane County, Hoffman's lawyer, Mr. Donald Eisenberg, objected to the presence of cameras in the courtroom, alleging that their presence there constituted a "cruel and unusual punishment." Mr. Eisenberg claimed that his client was "so frightened" that she could not talk in front of the cameras. Mr. Eisenberg, however, did not ask the court, by motion, to bar cameras, apparently being content merely to state his point. All this was reported in a story appearing in the Capital Times of Madison on April 7, 1978.

Case of Paul T. Jones, Jr.

According to a story which was published in the Milwaukee Journal on April 25, 1978, Circuit Judge Robert W. Landry of Milwaukee barred

television and radio recording in the murder trial of Jones. However, Judge Landry did permit the use in the courtroom of still cameras operated by newspaper photographers. The judge, according to the news account, expressed concern about possible references by witnesses to a particular juvenile witness; the witness had informed the court that he feared for his safety if identified. The matter was appealed to Chief Judge Michael T. Sullivan who, on April 25, 1978, declined to overrule Judge Landry's decision in this case. [1/]

III.

FEDERAL AND STATE VIEWS

The special interest of the American legal profession in the photographing of trial proceedings dates from its concern with the events that occurred at the Lindbergh kidnapping trial in 1935. Unquestionably, the trial of Bruno Hauptmann was conducted in a circus atmosphere, with some 700 newsmen and 129 photographers milling about the little town of Flemington, New Jersey. See State v. Hauptmann, 180 A. 809 (N.J. 1935), cert. denied, 296 U.S. 649 (1935). The events at Flemington led to the adoption by the House of Delegates of the American Bar Association, in 1937, without debate, of Canon 35 of the Canons of Judicial Ethics, a rule banning all still photography and radio from the courtroom. In 1952 the Bar Association added television to Canon 35. Rule 53 of the Rules of Criminal Procedure for the U.S. District Courts is to the same effect, providing as follows: "The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court." Thus it is clear that neither still photography nor televising of proceedings is permitted today in any federal court.

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[1/] The observer's report of State v. Patri tried in La Crosse County before Judge Frederick Fink was not received in time to be included in the report. Because the observer Joseph Zobin did a thorough job of interviewing witnesses and all of the jurors, his report is included as Appendix I.

There is, however, at the present time, no federal due process rule which forbids the states to permit photography in their own courts. The key decision on this point, Estes v. Texas, 381 U.S. 532 (1965), did not, as is often asserted, prescribe a specific rule on the point. Estes, a much-publicized financier, was convicted in a Texas District Court of the offense of swindling, after a trial of great notoriety, portions of which had been televised and broadcast over his objection. While Estes succeeded in persuading the U.S. Supreme Court to set aside his conviction on the due process ground that he had been denied a fair trial, only four Justices voted in favor of a per se rule which would flatly forbid the televising of trials by state courts over objection. The opinion of the Court, pronounced by Justice Clark, was only a plurality opinion of four Justices. Justice Harlan concurred separately in the judgment of the Court, but he rejected the concept of a per se rule against the televising of courtroom proceedings. He voted to reverse on the ground that all things considered, this particular criminal trial, of such great notoriety, had been flawed by the failure of the trial judge to control his environment, but he added that "forbidding this innovation,...would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." (381 U.S. 587) Thus, in a very brief explanatory opinion, Justice Brennan stated: "I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances.... Thus today's decision is not a blanket constitutional prohibition against the televising of state criminal trials." Justice White, who also dissented, observed that we do not know enough about the impact of television to warrant the framing of a general per se rule. In his dissenting opinion, Justice

Stewart pointed out that the techniques of public communication are subject to continuous and unforeseeable change, and that the Court should not interfere with the considerable discretion of the trial judge. Even Justice Clark, who wrote the plurality opinion, concluded with this observation: "It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today." (381 U.S. 551)

It must be noted that the Estes case was not only inconclusive on the point at issue, but was decided fifteen years ago. Most assuredly, there have been tremendous improvements since then in the equipment and techniques available for television and still photography. It may be said with some confidence that the electronic media have developed technologically to the point that still cameras and broadcasting equipment are no longer obtrusive. Furthermore, many states have proceeded on the assumption that the Estes case did not settle the issue. Indeed, all over the country electronic equipment has been used in many aspects of judicial proceedings, to record testimony, to record police line-ups, to record confessions and statements by material witnesses. Furthermore, there were several instances of the broadcasting of trials in the 1950's in a few states, e.g. Texas, Kansas, Oklahoma and Idaho. By order of February 27, 1956, the Supreme Court of Colorado voted to permit the photographic coverage of certain trials, provided that all parties involved had given their prior permission. The Florida Supreme Court began an experimental year of broadcasting trials by order effective July 5, 1977. At the present time, the Florida Court has under advisement the question of

making the experimental rules permanent. Today about fourteen states permit some sort of broadcasting of judicial proceedings under a wide variety of rules. Thus, the Supreme Court of Louisiana began a one-year trial for one district court, beginning February 23, 1978. The highest courts of Minnesota and Montana have recently authorized one or two-year experiments with broadcasting trials. In New Hampshire, broadcasting is entirely within the discretion of the trial judge. In Tennessee broadcasting is permitted only in the State Supreme Court. New Mexico is conducting an experiment which requires all participants in the trial to give their consent. Since 1975 the Supreme Court of Alabama has permitted photography subject to authorization by the presiding judge, and any participant may request that the cameras be turned off. Currently, the issue is a live one in several states, including California, Kentucky, Ohio and Oklahoma.

Thus, it is worth noting that in August, 1978, the Conference of Chief Justices, by a vote of 44-1 adopted a resolution which would relax ABA Canon 35. The resolution declared that the supervising appellate court "may allow television, radio and photographic coverage of judicial proceedings in courts under their supervision consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice." On the other hand, in February, 1979, the House of Delegates of the American Bar Association voted against courtroom photography.

The experiment with courtroom photography in Florida has stirred up a great deal of interest. The guidelines were put to a serious test in the widely-discussed murder trial of Ronny Zamora. Dade Circuit Judge Paul Baker, who presided over the Zamora trial, declared: "The First Amendment right to a public trial means just exactly what it says." Defense counsel

Ellis Rubin advanced, without success, the very unique defense of "television insanity," but this made for a very dramatic trial which riveted the attention of hundreds of thousands of Floridians. Trial Judge Baker, at its conclusion, pronounced the conduct of the case as worthy of being viewed as a "success." During the experimental year in Florida, several murder trials were televised in their entirety, as well as an insurance fraud trial in Dade County. One judge turned off the cameras to prevent the filming of testimony by several federal informants who were living under new identities, and one judge forbade the filming of a 16-year old rape victim. A report by three professors at Florida Technological University concluded that 76.6% of the 130 circuit judges who responded to a survey indicated that the television cameras caused no "serious distraction" in court, and 68.1% of these judges said that the television cameras had no "adverse influence" on witnesses. Furthermore, of the 52 jurors who were questioned, 56% said that the television cameras were not distracting, while 35% thought they were. Said Chief Justice Ben Overton at the end of the experimental year: "There have been no substantial problems presented in this court with regard to the pilot program." As reported in a story by Al Messerschmidt in The Miami Herald for June 30, 1978, however, there is formidable opposition in Florida to making the experimental rules permanent, from the Florida Bar, the state's Conference of Circuit Judges, the Florida Public Defender's Association, and prominent private defense attorneys. By a 4-3 vote, the Supreme Court of Florida refused to extend the experiment beyond the designated year, and the matter is still under advisement.

On January 3, 1979, the Chairman of this Committee wrote a letter to all circuit judges in Wisconsin, requesting their reaction to whatever experience they may have had, or were aware of, with regard to the impact of photography

and radio broadcasting in the courtroom. Specifically, the judges were requested to state an opinion, with or without supporting rationale, as to whether or not they approved of the televising of courtroom proceedings, and they were encouraged to comment on the guidelines prescribed by the Supreme Court for the experimental year. The Committee attaches the highest importance to the views of the judges who preside over our general-jurisdiction trial courts, for, after all, they are right on the firing line, and must live with the rules laid down for their guidance. It is highly regrettable that a majority of the 181 circuit judges did not reply, at least by the day which had to be treated as the cut-off date for the preparation of this report. But, of the 55 circuit judges who did reply, 44 judges indicated, in one fashion or another, that they approved of the televising of trials, and did not believe that photography in the courtroom defeated the holding of fair trials. Candor suggests that it ought to be stated that approval was expressed in many different ways, some with whole-hearted enthusiasm, and other rather grudgingly. On the other hand, only 8 circuit judges clearly expressed opposition to the use of photography in the courtroom, although here again the opposition was expressed with varying degrees of emphasis. Only one circuit judge went so far as to pronounce the year's experiment a "flop". On the other hand, Judge Richard G. Greenwood of Green Bay spelled out a fully reasoned statement of opposition to the televising of trials. He alluded to the technological difficulties involved, the reporting out of context where only portions of a trial are televised, "the natural fear and anxiety" of witnesses, though he was not worried about the impact upon judges and lawyers, the belief that sensitive personal matters, as in divorce cases, should not be exposed to the view of the public at large, and the conviction that the open court room suffices for those who are interested in finding out how our courts operate. Three responding judges expressed no opinion.

Some 11 judges said, in various ways, that our courtrooms are not physically adequate to accommodate television cameras and should be altered accordingly. On the other hand, 7 judges took the position that the alteration of existing courtrooms to accommodate television is not an expense which the county should be asked to assume. Apparently the tenor of their remarks on this point was that since television is a commercial enterprise, it ought to pay its own costs. Perhaps a short answer would be that the televising of trials, at least in the view of this Committee, is in the public interest. Several judges stressed the importance of retaining intact the authority of the trial judge over his courtroom. Several judges thought that television is interested mainly in sensationalism, and broadcasts only bits and pieces of trials, from which it follows, in their view, that broadcasting by television is not likely to be as educational to the general public as is generally asserted. Five judges took the position that it is too early to arrive at a firm policy, and that the experimental period should be extended in order that a final decision can be made on the basis of a more substantial experience.

The Committee regrets that it heard from only a minority of the circuit judges, although 55 returns out of a possible 181 represent a substantial sample worthy of our attention. No doubt, if we waited longer, more replies would drift in, but in order to get this report prepared in time for submission to the Court on the agreed-upon date, we had to be content with the replies that had already come in. On the whole, the Committee reads the replies as indicating that a substantial majority of the circuit judges either approve of the televising of trials, or at the very last, do not disapprove of doing so. The Committee attaches considerable weight to this body of expert opinion.

IV

BASIC POLICY VIEWS OF THE COMMITTEE

The basic concept upon which this report rests was well stated by Justice Douglas in a leading case decided in 1947: "A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S. 367, 374. In a larger sense, there is a growing feeling in the country, as reflected in many open-meeting state statutes and in such federal statutes as the revised Freedom of Information Act, that the general public has a right to know what is going on in all branches of government at all levels. As stated by Justice Joseph A. Boyd, Jr., of the Supreme Court of Florida, in a recent law journal article: "The dramatic political and governmental revelations of recent years have inspired a renewed interest in public affairs. Citizens are becoming increasingly conscious of their right to be informed about the activities of their local, state and federal governments. Public institutions are responding to this growing citizen awareness by becoming more open to the public view." ("Cameras in Court: Estes v. Texas and Florida's One Year Pilot Program," University of Miami Law Review, Vol. 32, 815, September, 1978).

Accordingly, the committee concludes unanimously that under appropriate guidelines pronounced by the Supreme Court and administered by the state's trial judges armed with a broad discretion to exercise necessary control over the judicial environment, still photography, radio broadcasting and

television cameras should be permitted in the courtrooms of the state. The committee is well aware of the objections generally voiced by those who oppose photography in the courtroom, and it is not prepared to assert that the objections are wholly without merit. There is some danger of distraction; it is quite possible that some witnesses will be affected by the knowledge that they are on the television screens of the community; and it is even possible that some attorneys and judges will alter their behavior because of the cameras, but while in some cases they may be tempted to strike special poses, on the other hand, the presence of cameras may well have the effect of reducing irascible behavior from the bench and rudeness from the counsel table.

On the basis of the evidence which has come to the attention of the committee, it has concluded that the advantages of permitting audio-visual coverage of the courtroom outweigh the disadvantages, and that within rules duly pronounced by the Supreme Court, and with more experience with the problems involved, and the development of better and more efficient cameras, procedures can be followed which would not defeat the right of parties involved in litigation to have fair trials.

So far as the broadcasting of courtroom proceedings by radio is concerned, the committee is unaware of any serious objections. Many modern courtrooms are already equipped with sound systems, and in such instances all the radio people have to do is to plug their equipment in the existing system. Even where courtrooms do not have electronic sound systems, the amount of equipment which the radio people would have to bring into the courtroom would be so minor in bulk, and so unobtrusive, as to present no problems worth discussing. Of course, the operator of the radio broadcasting apparatus should

not be permitted to speak into the mike in the courtroom while the trial is proceeding, but apart from this, the committee is unaware of any problem which would make radio broadcasting of judicial proceedings unwise or undesirable.

Similarly, the committee sees no serious problem in permitting still photography on the part of still photographers, even though the committee recognizes a sound problem. Of course, as the present rules make clear, no flash or other special lighting should be permitted, but modern still cameras are now so efficient and so sensitive that good pictures can be taken with ordinary lighting in the room. Still photographers should not be permitted to move about the courtroom for picture-taking purposes, however, and the judge and the bailiff should make that clear, and if a press photographer persists in violating this simple rule, then that person's right to take pictures in the courtroom should be withdrawn. Furthermore, the committee sees little point in insisting that once in the courtroom, the still photographer must not leave the chamber until the next recess. It is reasonable to ask that person to be in place before the proceeding begins, but once the photographer has the desired pictures, he or she ought to be permitted to leave the room. After all, visitors sitting behind the rail are free to come and go, and do come and go, during the proceedings, and the committee can see no good reason for insisting that still photographers must remain in their seats until the next recess, once they have the pictures they want.

While many people assert that television exerts a distracting influence on the participants in the courtroom proceedings, the evidence before the committee suggests that the distraction does not rise to such dangerous levels as to defeat the objective of holding fair trials. It is also argued that television has the result of imposing additional responsibilities upon an already over-burdened judge who, at least in serious criminal trials, has

many other things to do, but the general tenor of responses from trial judges in this state is to the effect that not much extra work is involved, and that as the media people and the judges and lawyers get accustomed to the processes involved in television, and particularly as there is growing familiarity with the rules of the court on the subject, trial judges will not find this a source of unduly great added work. The committee believes that it might be wise to ask the television operator to turn off the red light, which can be done very easily, and which seems to signal attention unnecessarily. The committee also believes that it would be desirable to remodel our courtrooms so that the television cameras are actually walled off from the bulk of the courtroom, and thus are as out of sight and unobtrusive as possible. Certainly it is possible to remodel the larger courtrooms for this purpose, and it is suggested that hereafter new courtrooms should be designed with this in mind, to provide separate facilities behind screens or walls for the location of the cameras.

The committee recommends that special mention should be made with respect to the photographing of the victims of sexual assault, very young children, undercover agents, relocated government witnesses, and in cases involving trade secrets, domestic relations and child custody. Furthermore, the sound of conferences between counsel and client, or between counsel and judge, should not be broadcast. Finally, the committee recommends the adoption of a rule which would control the photographing of the jury, to the extent that individual jurors are identifiable, except in extraordinary situations where consent has been given. It is obvious that in many courtrooms it would be physically impossible to photograph a witness or other participant in the proceeding which did not in some measure include the jury. What the committee thinks should be forbidden are tight shots which actually identify individual jurors. The committee is deeply concerned about the dangers involved in any

invasion of jury anonymity; jurors are drawn at the last moment from the general mass of the community, and disappear into the community when the trial is over.

As John H. Wigmore once wrote:

> "We are good friends of jury trial. We believe in it as the best system for a free people in the world's history. In spite of all suggestions to substitute the trained judge of fact, we believe that a system of trying facts by a regular judicial official, known beforehand and therefore accessible to all the arts of corruption and chicanery, would be fatal to justice. The grand solid merit of jury trial is that the jurors of fact are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial." (Journal of the American Judicature Society, Vol. 9, p. 61, 1925).

If this is a proper view of the nature of the jury, it would seem to follow that the anonymity of jurors should be respected. An interesting letter from Circuit Judge Thomas H. Barland of Eau Claire, dated 18 January 1979, supports this position. He writes: "I have excluded the photographing of jurors. The cameramen have not been happy with this rule, but with one exception, all of the jurors quizzed as to their reactions to be photographed on a criminal case, have responded that they do not wish to be photographed. They are afraid of undue publicity or outside pressure." Similarly, Mr. James C. Eaton, the District Attorney for Barron County, wrote to the committee as follows on 10 January, 1979: "Frankly I found the cameras somewhat distracting but not a real source of irritation. My concern, however, lies with complaints of the jury who came to me after having seen the cameras and then having seen their picture all over the front pages of Minnesota and Wisconsin newspapers. The jury members that approached me were very concerned and, in my opinion, somewhat frightened by the attention. Anonymity is not a luxury in a rural community as it would be in an urban area."

V

## SPECIFIC RULES RECOMMENDATIONS

The Committee closes this report with some recommendations for the revision of the guidelines which the Supreme Court adopted at the beginning of the experimental year. The Committee recommends the use of the word "Rules" instead of "Guidelines." There seems to be a formality about the term "Rules" which makes it more appropriate to serve as a body of procedural law, whereas the term "Guidelines" seems to convey an informal and tentative intent on the part of the Court. Furthermore, wherever the word "standards" has been used, the word "rules" has been substituted. In addition, the Committee recommends that wherever "presiding judge" is used, the term "trial judge" should be substituted, since the phrase "presiding judge" has a meaning of its own in Wisconsin.

This report deals with the Court's Guidelines seriatim, and adds comment and suggests changes where they seem warranted.

Court Guideline No. 1

Authority of Trial Judge

(a) These rules of conduct do not limit or restrict the power, authority, or responsibility otherwise vested in the trial judge to control the conduct of proceedings before the judge. The authority of the trial judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by these rules.

Suggested Addition

(b) The term "trial judge" includes any judicial officer who conducts a public proceeding.

Comment: This rule seems to be altogether proper, and only a minor change in its language is recommended. Many circuit judges, either in direct testimony or by letter, have indicated how important it is that the traditional authority of the trial judge to control the courtroom environment should be preserved.

Furthermore, no rules can be or should be so detailed as to cover all possible contingencies, and the judge must have elbow-room in which to make decisions relating to problems growing out of the presence of the electronic media in the courtroom. The new subsection (b) is intended to include other judicial officers, such as court commissioners, who conduct public judicial business.

Court Guideline No. 2

Media Coordinator

> The media covering each administrative district shall designate a coordinator to work with the chief judge of the administrative district and the trial judge in a court proceeding in implementing these rules.

Suggested Restatement:

> (a) The Wisconsin Freedom of Information Council shall designate for each administrative district a coordinator who shall work with the chief judge of the administrative district and the trial judge in a court proceeding in implementing these rules. Geographically large administrative districts shall be subdivided by agreement between the Council and the chief judge, with a coordinator designated for each subdistrict.
>
> (b) Where possible, the trial judge shall be given at least five days' notice of the intention of the media to bring cameras or recording equipment into the courtroom. In the discretion of the trial judge, this notice rule may be waived where cause for such waiver is demonstrated.

Comment:

The Committee believes it desirable to focus responsibility as precisely as possible for the selection of media coordinators. The original rule is much too vague and open-ended. The Wisconsin Freedom of Information Council, of which Mr. Robert H. Wills, editor of the Milwaukee Sentinel is currently President, is almost ideally suited to carry out the selection function. The Council is sponsored by the Wisconsin Associated Press, the Broadcast News Council, the United Press International, the Society of Professional Journalists, Sigma Delta Chi, the Wisconsin Broadcasters' Association, the Wisconsin Press Photographers, the Wisconsin Newspaper Association, and the

Wisconsin Universities Journalism Council. Clearly this umbrella organization represents most of the print and broadcast media in the State. It already has a standing committee, one of whose functions is to select regional coordinators.

Several witnesses who appeared before the Committee, or communicated with it by letter, called attention to the fact that some of the ten administrative districts are much too large to be supervised by a single coordinator. For example, District 10 consists of 13 counties; District 9 has 14 counties; and there are 12 counties in each of Districts 6 and 7. Accordingly, it is suggested that the rule require the creation of subdistricts, at least in the very large districts, by agreement between the chief judge and the Council.

Finally, many circuit judges have stressed the desirability of requiring the media to give them some notice of their intention to bring electronic equipment into the courtroom. They expressed considerable irritation with media representatives descending upon them at the very last moment before proceedings are to get under way. The committee believes it is reasonable to require the media to give the judge reasonable notice of what they plan to do. One judge suggested two weeks' notice, but five days' notice seems to be adequate and probably more likely to be workable. Of course, there is always the possibility of exceptions, and the judge should have discretion to waive or shorten the notice rule if good cause is demonstrated.

Court Guideline No. 3

Equipment and Personnel

(a) One portable camera (either 16 mm sound on film, self-blimped, camera, or videotape electronic camera), operated by one person is authorized in any court proceeding. One additional camera operated by one additional person is authorized if a request to film or tape the proceeding is received from a person or organization which does not have a camera of the same type as the first camera authorized. One additional camera operated by one additional person is authorized to permit a person or organization to televise live or to film the entire court proceeding from beginning to end. A maximum of three cameras are authorized under this rule.

(b) Two still photographers, each using not more than two cameras with not more than two lenses for each camera, are authorized to take photographs for the print media in any court proceeding.

(c) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes must be made through any existing audio system in the court facility. If no suitable audio system exists in the court facility, microphones and related wiring must be unobtrusive.

(d) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by these rules in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude all audio or visual equipment from the proceeding.

Suggested Restatement:

(a) Three television cameras (film, videotape, live), each operated by one person, are authorized in any court proceeding. Priority consideration will be extended to one of the three cameras to televise an entire proceeding from beginning to end.

(b) Three still photographers, each not using more than two cameras, are authorized to take photographs for the print media in any court proceeding.

(c) The trial judge or the chief judge may authorize the use of additional cameras at the request of the media coordinator in extraordinary court proceedings or may limit the number of cameras where physical circumstances require limitation.

(d) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes must be made through any existing audio system in the court facility, when practical. If no suitable audio system exists in the court facility, microphones and related wiring must be unobtrusive.

(e) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by these rules in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude all audio or visual equipment from the proceeding.

Comment :

The slight change in subsection (d), is based on the fact that some court sound systems would not satisfy the requirement of adequate broadcasting.

The Committee believes that the original Court guidelines, which ruled out more than three television cameras or two still cameras, are unduly restrictive. There is no persuasive reason why, at least in a large courtroom, in the case of a trial commanding unusual public interest, the judge should not be permitted to admit more than 3 television cameras or more than two still cameras. For example, five television cameras were present in one of Dane County's larger courtrooms for the arraignment of two state legisators on credit card abuse charges. Furthermore, there does not seem to be any persuasive reason why a still photographer should be limited to two lenses for each camera. A demonstration before the Committee indicated beyond any doubt that changing lenses is a very quick and simple operation that should create no problems of distraction at all.

Court Guideline No. 4

Sound and Light Criteria

Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices must not be used in connection with any audio or visual equipment. Only equipment approved by the trial judge in advance of the court proceeding may be used during the proceeding.

Comment: This guideline should remain as is.

Court Guideline No. 5

Location of Equipment and Personnel

(a) The trial judge shall designate the location in the courtroom for the camera equipment and operators. The presiding judge shall restrict camera equipment and operators to areas open to the public, but the camera equipment and operators must not block the view of persons seated in the public area of the courtroom.

(b) Camera operators shall occupy only the area authorized by the trial judge and shall not move about the courtroom during the court proceeding. Film, tape, or lenses must not be changed during the court proceeding. Equipment authorized by these rules must not be moved or changed during the court proceeding.

Suggested Restatement:

(a) The trial judge shall approve the location in the courtroom of audio-visual equipment and operators.

(b) Camera operators shall occupy only the area authorized by the trial judge and shall not move about the courtroom for picture taking purposes during the court proceeding. Equipment authorized by these rules may not be moved during the court proceeding.

Comment :

The Committee suggests two changes in subsection (b). One is to forbid camera operators from moving about the courtroom for picture taking purposes. Otherwise, we see no very good reason why a photographer may not, for example, leave the courtroom to go to a toilet, or for that matter, why that person may not leave the courtroom once he or she has the desired pictures. It seems to the Committee wholly unnecessary to insist that once a still photographer has taken pictures, that person must remain seated until the next recess. The photographer ought to have the same freedom to come and go that other members of the public enjoy. What we want to forbid is a camera operator jumping around from place to place during a proceeding to get different shots. We also suggest deletion of the second sentence of (b) on the ground that it serves no useful purpose and is unduly restrictive. Demonstrations before the Committee indicated that film, tapes and lenses can be changed without causing any noticeable distraction or commotion. Actually, with modern equipment they are very simple operations that are accomplished in a few seconds. Finally, the second sentence in subsection (a) is superfluous. The Committee believes that it is sufficient to require the approval of the trial judge.

Court Guideline No. 6

Courtroom Light Sources

Modifications in the lighting of a court facility may be made only with the approval of the trial judge. Approval of other authorities may also be required.

Comment: Leave as is.

Court Guideline No. 7

Conferences

Audio pickup, broadcast, or recording of a conference in a court facility between an attorney and client, co-counsel, or attorneys and the trial judge held at the bench is not permitted.

Comment: Leave as is.

Court Guideline No. 8

Recesses

Audio or visual equipment authorized by these rules must not be operated during a recess in a court proceeding.

Comment: The Committee is unaware of any compelling consideration that justifies this rule. Newspaper reporters are certainly free to move about the courtroom during a recess and talk to anyone who will talk to them, and it is not at all clear that the operators of television cameras should be denied the same privilege. Accordingly, it is suggested that this guideline be dropped, or restated as follows:

Recesses, Periods before and after Court

Audio or visual equipment authorized by these rules may be operated during recess in court proceedings and before and after court, subject to reasonable restrictions imposed by the trial judge to maintain proper decorum and security and to avoid any photography or broadcasting which would impair the right to a fair trial.

Court Guideline No. 9

Use of Evidence

Any film, videotape, photography, or audio reproduction made as a result of these rules is inadmissible as evidence in any court proceeding.

Suggested Restatement:

Any film, videotape, photography, or audio reproduction made in a court proceeding as a result of these rules is inadmissible as evidence in any appeal or retrial of the same action.

Comment: The thought occurred to the Committee that the cameras may record a fresh crime actually occurring in the courtroom. Surely such photography could be used as evidence in a later trial for that crime.

Court Guideline No. 10

Resolution of Disputes

A dispute as to the application of these rules in a court proceeding may be referred only to the chief judge of the administrative district for resolution as an administrative matter. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by these standards any order or ruling of a presiding judge or chief judge under these rules.

Suggested Restatement:

(a) A dispute as to the application of these rules shall be referred by the trial judge, after making a record, to the chief judge of the administrative district for final resolution. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by these rules any order or ruling of a trial judge or chief judge under these rules.

(b) At the conclusion of a proceeding, the media shall have standing to litigate in the appellate court the validity of decisions made under these rules.

Comment: The slight change in the language of 10(a) is to make it clear that the trial judge must give reasons for the decision appealed from, and that the decision of the chief judge is final.

The new section 10(b) is designed to give the media standing to litigate in the appellate court legal issues growing out of decisions made by trial judges and/or chief judges under these rules. While the media are not parties to the cases themselves, the committee believes that they ought to have some way to test in an appeals court the legality of decisions made under these rules. Such a procedure would promote the rule of law so far as the agencies of mass communication are concerned and free them from dependence upon the actions taken or not taken by the parties in particular cases. For example, a defendant who has been acquitted in a criminal case has no reason or standing to appeal any error alleged to have occurred in the course of the trial, but it may happen that in the course of the trial the judge made a ruling or rulings directly affecting the freedom of the media to function as they deem essential and raising legal issues which a higher court ought to have jurisdiction to resolve. Whether it is constitutionally proper for the Supreme Court to separate appealable issues in this fashion and confer standing on a nonparty are questions which the Committee believes are for the Supreme Court to resolve.

Committee Members Edward Hinshaw, James Hoyt, Richard Bauer, Nancy Mersereau and Anne Rossmeier make the following minority statement: To make it clear that these rules do not preclude other legal actions which may be important to the news-gathering process, we propose the following language be added to Rule 10(b):

> The foregoing limitations on appeals or requests for supervisory relief from the appellate court apply only to orders or rulings which prospectively deny or limit the use of audio or visual equipment in the courtroom. They do not limit or restrict the power, authority or responsibility of the appellate court to review orders or rulings even though related to or arising from such recording or photography, which otherwise affect such persons or organizations, including, without limitation, contempt citations and restraints on publication.

Court Guideline No. 11

Prohibition on Photographing at Request of Participant

A trial judge may for cause prohibit the photographing of a participant with a film, videotape or still camera on the judge's own motion or the request of a participant in the court proceeding.

Suggested Restatement:

(a) A trial judge may for cause prohibit the photographing of a participant with a film, videotape or still camera on the judge's own motion or on the request of a participant in a court proceeding. In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in confession hearings, divorce proceedings and cases involving trade secrets, a presumption of validity attends the requests; the trial judge shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the presumption is not inclusive; the judge may in his or her discretion find cause in comparable situations.

(b) Individual jurors shall not be photographed, except in extraordinary instances in which a juror or jurors consent. In courtrooms where photography is impossible without including the jury as part of the unavoidable background, such is permitted, but close-ups which clearly identify individual jurors are prohibited. Trial judges shall enforce this rule for the purpose of providing maximum protection for jury anonymity.

Comment: As the Court knows, and this was reflected in the explanatory statement circulated to all judges by the Chief Justice on 21 April 1978, there has been a great deal of discussion as to the precise meaning of "cause" within the scope of Rule 11. While the Committee believes it would be unwise to spell out to the last precise detail just what constitutes good cause, it does hold that to some extent specific content may be supplied by including the suggested additional language.

Committee Members Edward Hinshaw, James Hoyt, Richard Bauer and Nancy Mersereau make the following minority statement: While we support the revised Rule 11, we do so in the spirit of compromise.

In our judgment any proscription of photography or recording is inconsistent with the intent and spirit of the original Supreme Court experimental guidelines. This should not, however, suggest that we are insensitive to the right of privacy of certain classes of individuals. Our preference would be to continue the original Guideline 11, with the language of clarification contained in the letter of Chief Justice Beilfuss dated April 21, 1978, addressed to all judges.

Court Guideline No. 12

Inapplicability to Individuals

The privileges granted by these rules may be exercised only by persons or organizations which are part of the news media.

Comment: Leave as is.

For the convenience of the Court, the amended rules endorsed by the Committee are restated in Appendix H.

## VI

## CONCLUSIONS

The Committee recognizes that the case for permitting photography in the courtroom is not a simple one, nor is it a one-sided case. It attaches great weight to the objections voiced by those who fear that the introduction of photography into the courtroom will defeat the right to a fair trial. The most persuasive and best thought out statement of objections to courtroom photography which was submitted to the Committee came from Robert J. Paul, the Deputy State Public Defender. As part of this report, Mr. Paul's statement is attached as Appendix G. Members of the Court may wish to read this statement. While the Committee does not share all of the fears that Mr. Paul has spelled out, it believes that the views he has expressed are shared by many, in and out of the legal profession, and are worth serious consideration.

The Committee believes that while problems have arisen in the past, and will in the future, when cameras are allowed to operate in the courtroom, on balance the advantages to society to be derived from courtroom photography outweigh the disadvantages. So far as radio broadcasting and still photography are concerned, the Committee has had little difficulty in reaching a positive conclusion. The debate centers on the use of television in the courtroom. The Committee takes the position that television is here to stay; it is not only a fact of life, but a very important fact of life in our society. The television people are, like the newspapers, in the business of gathering and disseminating news. In fact, it is widely believed that more people rely upon television for news than upon newspapers. It is said that the television companies are private enterprises in the business of making money. It is hardly necessary to recall that newspapers are not eleemosynary institutions, but are also published for profit. It is true that television stations are likely to concentrate upon sensational cases, but the same can be said for newspapers. In any event, in the case of both the print media and television, we have no choice but to rely upon the judgment of the professionals as to what is truly newsworthy. Whether a particular event is newsworthy is a matter of informed judgment, best made by those whose everyday business it is to make such judgment. An item may be newsworthy one day, and not another, depending on what is going on in the society covered by the particular media. So long as we continue to believe in a free press, and a free press is specifically guaranteed by the United States Constitution and the Constitution of the State of Wisconsin, then we must recognize that one essential element of that freedom is the right to decide the issue of the newsworthiness of an event. Furthermore, the committee believes that with further experience, as the judges, lawyers and media get

accustomed to operating under duly constituted rules, difficulties encountered so far will be smoothed away. The day is not far distant when photography in the courtroom will arouse no more excitement than the presence of newspaper reporters in the courtroom.

Accordingly, the Committee recommends:

1. In general, the guidelines or rules pronounced by the Court, as amended by the Committee, should be adopted as a permanent set of rules, it being understood, of course, that the Court will always be free to reconsider its position in the future, if events dictate reconsideration.

2. Radio broadcasting, still photography, and television cameras should be permitted in the courtroom, subject to strict observance of the rules of the Court, and subject also to the understanding that the presiding judge at a trial has a wide discretion to control the judicial environment, because ultimately it is his or her responsibility to assure to all parties a fair trial.

In making these recommendations, the Committee recognizes that various broad objectives must be pursued. It is vitally important that not only should justice be done in our courts, but that justice should appear to be done. Litigants are entitled to fair trials, and all persons who are involved in court proceedings should be treated with respect for their essential dignity as the citizens of a free society. At the same time, trials are public events; our tradition frowns upon secrecy in government, and few events are more abhorrent in our historical experience than secret trials. The guarantee of a public trial, Justice Black once wrote, "has always been recognized as a safeguard against any attempt to employ our

courts as instruments of persecution." (In re Oliver, 333 U.S. 257, 270, 1948). The essential problem is to find a proper balance between these various interests. The task of discovering points of balance between various interests, however, is no novelty in the law. The Committee believes that in respect to the subject matter of this report, an acceptable balance has been struck. If future experience should indicate that the rules are not suitable, then it is within the province of the Supreme Court to revise them. In the present state of our knowledge and available technology, the Committee is satisfied that the amended rules it has recommended to the Court represent a policy with which we can go forward with confidence.

This report was approved by a unanimous vote of the committee on March 24, 1979

David Fellman, Chairman

William Adler

Richard Bauer

William J. Duffy

William F. Eich

Edward Hinshaw

James Hoyt

Nancy Mersereau

James Peter O'Neill

Anne Rossmeier

Michael T. Sullivan

APPENDIX A

CORRESPONDENCE/MEMORANDUM — STATE OF WISCONSIN

Date: April 26, 1978 File Ref:

To: Professor David Fellman, Chairman
Committee on Audio-Visual Equipment in Courtrooms

From: Chief Justice Beilfuss

Subject: Audio-Visual Equipment in Courtrooms

The Supreme Court in its orders concerning the one year experiment with the use of audio or visual equipment in courtrooms provided for the appointment of your committee. The committee is to monitor and evaluate the use of audio or visual equipment in courtrooms during this experimental period and is to file a report with the Court no later than March 1, 1979.

The purpose of the Court in appointing the Committee was to have an independent body advise the Court on the success, failure or problems with the use of audio or visual equipment in courtrooms, whether the use of such equipment should be permitted on a permanent basis, and if so, under what conditions. If the committee concludes that such equipment should be authorized on a permanent basis, it should prepare proposed rules in its report.

The committee in gathering information upon which to make its report should rely upon the experience of its members, a review of reports in the news media on the use of the equipment in courtrooms, reports to the committee made by judges who preside over trials at which audio or visual equipment is used, the reports of staff members who may observe the use of the equipment in the courtrooms, and any other information the committee believes relevant.

The Committee is expressly authorized to request judges to file with the committee reports on their experiences with the equipment, and all judges in the state are requested to prepare such reports for the committee.

The committee may employ observors upon such terms and conditions as may be authorized by the Chief Justice or his designee.

The members of the Committee are entitled to be reimbursed for their expenses in connection with service on the committee in accordance with the Supreme Court's travel expense regulations.

William Mann, Supreme Court Commissioner, is designated to serve as reporter for the committee.

BFB/skk

# APPENDIX B

## QUESTIONS TO BE ADDRESSED TO THE JUDGE

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record the name of the judge and how long he has served as a judge; also note which of the three media were used in the trial: (a) television cameras; (b) radio equipment; (c) still cameras)

1. What, if any, influence do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on you during the trial?

2. Did the presence of (a) television cameras, (b) radio equipment, and (c) still cameras seriously increase your supervisory responsibilities?

3. If your response to question 2 was in the affirmative, did those responsibilities interfere with your principal duties as a presiding judge?

4. Did the presence in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras produce more letters, telephone calls, et cetera, then you usually receive?

5. What, if any, impact do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on the witnesses?

6. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the behavior of counsel?

7. What, if any, problems occurred because of the use of (a) television cameras, (b) radio equipment, and (c) still cameras in your courtroom?

8. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

9. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

10. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

11. Describe any requests you received for the prohibition of (a) television cameras, (b) radio equipment, and (c) still cameras, the action you took based on those requests, and the reason(s) for your action.

12. Overall, what is your general evaluation of the use of (a) television cameras, (b) radio equipment, and (c) still cameras, in the courtroom?

# APPENDIX C

## QUESTIONS TO BE ADDRESSED TO COUNSEL

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Be sure to identify lawyers as to whether they were appearing for defendants or as prosecutors)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

2. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the strategy of litigation you intended to use?

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the manner in which you examined or cross-examined witnesses?

4. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on your contacts or relationship with the judge?

5. Did (a) television cameras, (b) radio equipment, and (c) still cameras result in producing more telephone calls, letters, etc., than you usually receive?

6. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

7. What effect, if any, did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

8. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

9. Overall, what effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

10. If you had a choice, would you have preferred to try the case with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

11. What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

# APPENDIX D

## QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

# APPENDIX E

## QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

# APPENDIX F

THE UNIVERSITY OF WISCONSIN
NORTH HALL
1050 BASCOM MALL
MADISON, WISCONSIN 53706

DEPARTMENT OF POLITICAL SCIENCE

18 August 1970

To: Members of the Committee on Courtroom Photography

From: David Fellman

Dear Colleagues:

I am enclosing, for your file, the final Report of our committee, revised in accordance with suggestions that came to me since the last meeting of the Committee. I am also enclosing copies of the letter of transmittal to the Court. You will observe that I have requested that the Committee be discharged. I have also indicated our willingness to meet with the Court to discuss the Report.

May I take this final opportunity to thank you for the constructive manner in which all of you cooperated in this assignment. I deeply regret that we could not produce a unanimous report, but I hope that what we have accomplished will be of some assistance to the Court as it confronts once more the problems of courtroom photography.

THE UNIVERSITY OF WISCONSIN
NORTH HALL
1050 BASCOM MALL
MADISON, WISCONSIN 53706

DEPARTMENT OF POLITICAL SCIENCE

18 August 1970

Chief Justice E. Harold Hallows
Supreme Court Chambers
State Capitol Building
Madison, Wisconsin 53702

Dear Chief Justice Hallows:

In behalf of the Advisory Committee to Recommend Rules on Use of Sound and Camera Equipment in the Courtroom, appointed by order of the Court on 27 January, 1970, I herewith submit to you its final report.

While all members of the Committee have signed the report, and while there were large areas of agreement, as spelled out in the report, I regret to say that on crucial questions there was a great deal of disagreement among them. On all questions concerning which agreement could not be achieved, the report indicates where each member of the committee stands.

I have been instructed by the Committee to inform you that all of its members are ready and willing to meet with the Court to discuss this report, if the Court so chooses.

This report concludes the work of the special advisory committee, and it therefore now requests that it be discharged.

I am enclosing a sufficient number of copies of the report so that some will be available for the press, should the Court decide to release this document to the press. If you need additional copies, I will be glad to supply them, since my secretary has kept the stencils.

All members of the Committee join me in thanking the Court for this opportunity to be of some service to the cause of the administration of justice in Wisconsin.

Sincerely yours,

David Fellman

David Fellman
Chairman

DF:nl

Final Report

# COMMITTEE TO RECOMMEND RULES ON USE OF SOUND AND CAMERA EQUIPMENT IN THE COURTROOM

I

Pursuant to the mandate of the Supreme Court in reference to the desirability and feasibility of amending Rule 14 of the Code of Judicial Ethics promulgated by the Supreme Court of Wisconsin, the Committee advises as follows:

Rule 14 reads:

> "A judge shall not, when it will interfere with the judicial process or fair trial, permit any radio or T.V. reproductions or taking of pictures in the courtroom during recess or before or after proceedings, or in adjoining corridors or offices; nor shall he permit any radio or T.V. reproductions or taking of pictures in the courtroom at any time during judicial proceedings.
>
> Comment: The rule applies to all judicial proceedings but shall not be applicable to investiture, ceremonial, or naturalization proceedings."

The Committee was constituted by order of the Court on January 27, 1970. The order of the Court read as follows:

> "This court has under consideration for sometime a petition requesting it to reconsider and modify Rule 14 of the Code of Judicial Ethics. The court has heard arguments and has seen demonstrations by the news media of sound equipment and of cameras in the courtroom. While the court has not decided that Rule 14 should be modified, it is interested in being more fully informed on the question of whether specific uniform rules of court can be devised for promulgation by the supreme court which would recognize reasonable demands of the news media to take pictures and to record voices in the courtroom and at the same time not tend to endanger the right to a fair trial by any litigant or to degrade the dignity of the court or to interfere with the administration of justice. Such rules must be specific as to type and amount of equipment permissible in a courtroom, the time and manner of its use, the distance from the subject, the supervision of the

court over the use of the equipment, necessary prohibitions on the use of such equipment, whether any reproduction should be limited to news purposes, and other conditions or necessary restrictions. Such recommendation of specific rules shall be advisory to the supreme court in its consideration of the motion to modify Rule 14."

The Committee has discussed Rule 14 very thoroughly in several meetings. It held one meeting in Milwaukee, in the courtroom of Judge Steffes, where representatives of the various media put on a demonstration through the staging of a mock trial by students of the Marquette Law School. Various technical aspects of still and television photography and radio recording were presented in their present state of technology.

II

While the Committee has been unable to produce a unanimous report, there is a considerable area of agreement. This report will first summarize the subjects as to which there is a general concensus.

1. The Committee wishes to call attention to the fact that in its present form Rule 14 does permit some picture-taking in the courtroom during recess or before and after proceedings, or in adjoining corridors or offices, with the permission of the judge. While the Rule admonishes the judge not to permit any interference with the judicial process or with a fair trial, he does have discretion to permit a limited amount of recording and picture-taking in or near the courtroom except during actual judicial proceedings. It is possible that the representatives of the various media have not been aware of the discretionary authority which is vested by Rule 14 in the trial judge, and that under it some picture-taking is permitted.

2. The members of the Committee agree that it would not be objectionable for the Supreme Court to permit an occasional televising of a trial,

in whole or in part, strictly for educational purposes, by a responsible broadcaster. The Court should be satisfied that the purpose of the filming is wholly educational, that all of the parties have consented, and that the entire process is under the strict supervision of the presiding judge. The Committee recommends that on the rare occasions where an educational filming is desired permission should be sought directly from the Supreme Court itself.

3. Members of the Committee agree that still photography creates fewer problems than television photography or voice recording for radio purposes, and a majority of members agree that it should be permitted, with appropriate safeguards. They recommend that no flash bulbs should be permitted, that hand-held cameras are to be preferred, and that no tripods should be used unless they are properly screened from view.

4. Members of the Committee also agree that voice recording for radio presents fewer problems than television, and that therefere there are fewer objections to recording for radio broadcasting than to the televising of court proceedings.

5. Members of the Committee also agree that if the televising of court proceedings is permitted, undoubtedly television stations will be highly selective, in that they will televise only a few trials, and not televise all trials routinely. For reasons of expense, time and public interest, a television station will only wish to televise an occasional trial; thus the station will have to pick and choose among all trials which are held in the community, and this factor of selectivity will unquestionably affect the proceedings in some fashion, by drawing special public attention to a few trials deemed unusually newsworthy.

6. While the Committee is divided as to the desirability of permitting still photography in the courtroom while court is in session, and radio and television broadcasting of actual judicial proceedings in the courtroom, its members agree that it is possible, from a technical point of view, to record or televise a trial without any serious physical obstruction of the proceedings, if the following guidelines are observed:

(a) Under no circumstances should there by any voice recording or photographing of any juror, or jurors, or any venireman.

(b) All television cameras should be in the rear of the courtroom, preferably behind a screen or some sort of partition.

(c) Under no circumstances should any cameras be permitted in front of the railing.

(d) All equipment should be installed at least ten minutes before the start of proceedings, and removed only during a recess.

(e) All electrical cords should be taped to the floors or to corners of walls in order to be as inobstrusive as possible.

(f) If at all possible, the available light in the courtroom should suffice. If the available light must be supplemented, the necessary equipment should be turned on before the start of proceedings, and remain on until a recess.

(g) It should be stipulated that there should be no moving about the courtroom on the part of media personnel.

(h) The existing public address system should be used if there is one in the courtroom. If not, the method of recording voice should be determined at a pre-trial meeting with the judge.

(i) Only noiseless cameras should be used while court is in session.

(j) The Committee recommends that before every trial there should be a pre-trial meeting of the media people with the trial judge to review guidelines, to determine camera position, and to deal with any specific

7. Assuming that recording for radio or photographing for television of courtroom proceedings is permissible, the Committee was divided as to whether or not the prior consent of any party or witness would have to be secured as a condition for the recording or photographing. Those who believe that consent should be required take the position that the individual party or witness has a right to safeguard his privacy and to protect himself from the pressures which may be generated by the recording or photographing. Furthermore, they hold that if prior consent is secured, grounds for a later allegation that a fair trial had been denied will be eliminated from a subsequent appeal. Those who believe that prior consent should not be required take the position that a trial is by definition a public event, and that therefore those who are involved have no right to be unidentified, just as they now have no right to remain unidentified so far as newspapers are concerned.

The Committee took separate votes on the issue of consent with respect to radio, television and still photography. Five members (Byers, Fellman, McCann, Pfiffner and Steffes) believe that consent should be required in the case of voice recording for radio broadcasting, while seven members (Bodden, Hopp, LeGrand, Schwandner, Shinners, Stafford and Steinmetz) believe that consent should not be required. With respect to television, six members (Byers, Fellman, McCann, Pfiffner, Steffes and Steinmetz) believe that consent should be required, while six members (Bodden, Hopp, LeGrand, Schwandner, Shinners and Stafford) do not believe that consent should be required. With respect to still photography, three members of the Committee would require consent (Byers, McCann and Pfiffner), whereas nine take the position that consent should not be required. (Bodden, Fellman, Hopp, LeGrand, Schwandner, Shinners, Stafford, Steffes, and Steinmetz).

8. In addition, the Committee believes that while pooling, particularly among television stations, is not generally to be desired, in unusual cases, with the permission of the judge, some sort of pooling arrangement may be

necessary in order to prevent overcrowding the courtroom with cameras. Each such case would have to be dealt with on its terms. From the point of view of the requirements of a fair trial there is no objection to pooling arrangements.

III

A majority of the Committee believes that with the safeguards spelled out above, it would be desirable to permit radio and television stations to record and broadcast actual courtroom proceedings. They believe that the electronics news media, holding a commanding position in the world of modern communications, are entitled to a full opportunity to report courtroom events in their own manner. They hold that since a trial is a public event to begin with, this merely expands the public in which the event occurs. They maintain that broadcasting or televising trials would tend to bring to the public a greater understanding of the court as an instrument of justice. They also believe that such broadcasting might possibly have the desirable effect of bringing the events of the trial to the attention of potential witnesses who might thereby be alerted to come forward and give testimony themselves. In addition, those who favor broadcasting, both by radio and television, believe that it would tend to correct the misconceptions about the nature of courtroom proceedings which many people have derived from the fictionalized and misleading presentations which appear in so many commercial radio and television programs. Thus they believe that broadcasting would strengthen public confidence in the courts as instruments of justice.

A minority of the Committee is opposed to the broadcasting of actual courtroom proceedings by radio or television largely on psychological grounds. The minority concedes that it is technically possible to record what goes on in the courtroom for radio and television without any physical disruption of the proceedings. The minority, however, does not believe that it is possible to erase the psychological impact of even the best-conducted forms of recording. It is apprehensive of the possible impact upon judges, upon the accused, upon witnesses, and upon the community in general. Perhaps

the major concern of the minority is with the possibility that radio and television may have the effect of reducing the willingness or ability of witnesses to come forward and tell what they know in a straightforward manner. They fear that if witnesses know that they are speaking to a large unseen audience, they may become either overly bold or overly timid, and that some witnesses might be unwilling to testify at all if they can possibly get out of it. Where judges are elected, as they are in Wisconsin, it is feared that television might, perhaps unconsciously, induce some of them to assume a posture for broadcasting purposes which would not be in the best interests of the administration of justice. It is also felt that television might have a harmful effect upon the accused, particularly if he does not have a good apperance, or if he does not conduct himself in a manner which comes through the television tube with maximum affectiveness. Finally, the minority believes that broadcasting from the courtroom will give the trial judge too many additional chores when his situation already imposes very heavy responsibilities upon him.

IV

In conclusion, the members of the Committee agree that it is possible, from a technical point of view, and following certain prescribed guidelines, to record or televise a trial without any serious physical obstruction of the proceedings. The Committee divides on the issue of the possible psychological impact of radio and television upon witnesses, parties, judges, and the public. Finally, the Committee, (with McCann and Pfiffner opposed) is prepared to recommend that still photography be permitted subject to the safeguards outlined above. It is therefore suggested that Rule 14 be amended by striking the phrase "or taking of pictures", and substituting in its place the following phrase: "but a judge may permit the taking of still pictures in the courtroom during judicial proceedings

when it will not interfere with the judicial process or fair trial under regulations pronounced by him, but never of any member of the jury".

V

On the central issue of whether radio and television broadcasting of court proceedings should be permitted, it is thought that the actual division of the Committee should be recorded, and that the division on the two forms of broadcasting should be indicated separately. The following eight members of the Committee are in favor of permitting the broadcasting of court proceedings by radio: Bodden, Byers, Hopp, LeGrand, Schwandner, Shinners, Stafford and Steinmetz. The following four members of the Committee do not favor radio broadcasting of judicial proceedings: Fellman, Pfiffner, McCann and Steffes. The following six members of the Committee are in favor of permitting the televising of judicial proceedings: Bodden, Hopp, LeGrand, Schwandner, Shinners and Stafford. The following six members of the Committee are opposed to the televising of judicial proceedings: Byers, Fellman, McCann, Pfiffner, Steffes and Steinmetz.

Respectfully submitted,

David Fellman, Chairman

Robert Bodden

James W. Byers

Duane W. Hopp

Roger W. LeGrand

Ray T. McCann

Robert F. Pfiffner

Harvey W. Schwandner

John J. Shinners

Willard S. Stafford

Herbert J. Steffes

Donald W. Steinmetz

COMMITTEE TO RECOMMEND RULES ON USE OF SOUND

AND CAMERA EQUIPMENT IN THE COURTROOM

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Platteville, Wisconsin 53818

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County Judge, Branch 2
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Hon. Robert F. Pfiffner
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Hon. Herbert J. Steffes
Circuit Judge, Branch 11
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Hon. Donald W. Steinmetz
County Judge, Branch 8
Milwaukee County Courthouse
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APPENDIX G

The State of Wisconsin
STATE PUBLIC DEFENDER

State Public Defender
Richard Cates (608) 266-3440

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Deputy State Public Defender
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Robert J. Paul (608) 266-8374

Deputy State Public Defender
Trial Representation Division
Ronald L. Brandt (414) 224-4807

February 1, 1979

Professor David Fellman, Chairman
Committee to Monitor Cameras in the Courtroom
University of Wisconsin
Department of Political Science
North Hall
1050 Bascom Mall
Madison, Wisconsin 53706

Dear Professor Fellman:

The following is a summary of the position of the State Public Defender's Office Appellate Unit concerning the continued use of cameras in the courtrooms.

At the outset, several introductory comments are perhaps in order so that the basis for our position, in opposition to the continued use of cameras in the courtroom, is well understood.

First, our position is founded on our attorneys' limited specific experiences with a few recent important cases involving television and cameras in the courtroom and on some experience with newsprint and other media. The office was involved in a minor fashion in a case in Milwaukee which concerned the televising of a retrial. We are presently involved in an interlocutory appeal of a Sauk County case which concerns newspaper and possibly television coverage of pre-trial proceedings in a murder-rape case. Our trial unit in Eau Claire represents a client on two counts of second degree murder and one of arson. Pre-preliminary hearing motions to exclude media reference to a confession were heard in chambers and denied. Other motions are contemplated.

We feel these experiences and our experience in the criminal justice system, as criminal defense specialists, qualifies us to make some observations and comments concerning this issue. We hope the Committee and the Supreme Court will consider comments based not only on the observations of the persons who directly participated, over the last ten months, in the handful of trials which were televised or photographed, but also the observations based on the more general experience of concerned practitioners.

Second, we do not cite any studies in support of our conclusion that cameras can, and in some cases will, render a criminal trial unfair. We are not aware of any definitive or comprehensive studies having been conducted in this area. The lack of such studies perhaps supports our belief that, ordinarily, it is extremely difficult to measure the effects cameras have on trial participants. The persons actually influenced by the cameras may not even recognize the impact the cameras have had on them. For this reason, we are particularly skeptical of "studies" which merely ask the trial participants whether they felt they or anyone else had been affected or influenced by the presence of cameras in the courtroom.

Third, our opposition to cameras in the courtroom stems in part from an obligation to protect the interests of the clients whom we represent. We represent indigent persons who have been charged with, or convicted of, state crimes. All of our clients are indigent, a substantial number are minorities, and the offenses generally involve "street crimes" (crimes of violence, theft, burglary, robbery, drug-related offenses, etc.).

Our clients generally do not desire, or benefit from, publicity in <u>any</u> form. Obviously, any publicity concerning the commission of a crime embarrasses and degrades not only the person charged but his family as well. More importantly, such publicity reinforces negative community attitudes toward indigents and minorities. Our clients, because of the types of crimes they have allegedly committed, their indigency, and at times other characteristics, already generate little public sympathy. Publicizing their problems with the law is not to their benefit. Fourth, it has been our experience that some trial judges respond to the public attitude toward "street crimes" by imposing heavier sentences (and using more colorful and humuliating language while doing so) when the proceedings are being covered by the media. Finally, pre-trial publicity is unavoidably one-sided and anti-defendant, for the simple reason that pre-trial proceedings generally involve only the disclosure of the prosecution's case. Rarely, if ever, will a defendant testify, call witnesses, or otherwise divulge the evidence in support of his defense prior to trial.

Thus, we are concerned about publicity in any form, but we are <u>most</u> concerned about the use of cameras (especially television cameras) in the courtroom. We, of course, recognize that virtually everything which happens in the courtroom is a matter of public record, and that any citizen could generally obtain the same information broadcast by the media by simply appearing at the courtroom and observing the proceeding. Realistically, however, the probability that a criminal defendant will not receive a fair trial because of the public's opportunity to attend the proceedings is not significantly increased because so few persons take advantage of the opportunity.

Television, however, presents a special problem. There is something about the medium which makes it particularly effective in shaping public opinion, even when matters are reported objectively (e.g., coverage of the presidential debates, Vietnam War, Watergate). Perhaps because its audience is passive, it reaches a much larger audience than any other medium. (The Ronny Zamora trial in Florida, wherein the "television intoxication" defense was raised, was viewed by an estimated 100,000 persons.) Unlike other media, television allows for the instantaneous dissemination of information, after providing little opportunity for the editing of prejudicial material. The information is absorbed by the public at or very near the time decisions regarding the criminal defendant's future are being made.

Television also presents a special problem because the high cost of broadcasting court proceedings will result in only the sensational trials being televised. These cases are exactly the ones where, because of the publicity already generated

by other media, there is the greatest risk that a fair trial cannot be had. The incremental harm wrought by simply televising the trial might be enough to "tip the scale," and to render the trial unfair.

The combination of these factors gives television the greatest potential for denying the accused his constitutional right to a fair trial, and it is the denial of this right with which we are most concerned. We, therefore, do not object to the use of cameras in appellate courtrooms. Because our concern involves the fairness of trials, the minimal disruption which is occasionally caused by technical and logistical problems in photographing or televising courtroom proceedings do not concern us. We assume that the media can solve most of these problems, or that they will resolve themselves through technological advances. We take no position on the use of cameras in civil trials, except to note that due to constitutional considerations applicable only to criminal cases, the argument against the use of cameras in courtrooms is perhaps more compelling in criminal cases.

Fair trials are threatened by the presence of cameras in the courtrooms because some witnesses will be reluctant to testify, and some jurors will be reluctant to acquit the accused, once the identities of these witnesses and jurors becomes public knowledge. The observation that "the honest witness doesn't object" to the cameras is an easy, but inaccurate, over-simplification. Our experience demonstrates that the incentive to testify, especially given the high stakes inherent in criminal cases, involves more complex considerations than this maxim suggests. (A recent example is the Milwaukee Journal story about Betty Kilmer who testified in a homicide trial which was not televised. A right to privacy is also at stake here and it concerns persons other than the defendant. A copy of the article is attached.)

A variety of factors enter into a jury's decision making process. Juries do not always decide cases solely on the evidence adduced at trial. A juror may be subconsciously motivated to convict a defendant if he believes that, as a result of the cameras being in the courtroom, he will be ridiculed for having acquitted the defendant. Of course, what is important is not whether jurors or witnesses are actually placed in danger or are actually held in public disrespect, but whether the jurors or witnesses consciously or unconsciously perceive these as possible consequences of the media coverage. The real danger is that trial judges, using the legal means traditionally available to them, will be unable to detect, much less minimize, the often subtle influences for which cameras are thought to be responsible.

Television cameras might also create incidental procedural problems effecting the fairness of the accused's trial. Coverage of pre-trial hearings will not only result in the publication of the evidence implicating the defendant, it will in some cases, result in the publication of evidence which is inadmissible at trial. This issue is presently pending before the United States Supreme Court in Gannett Co. Inc. v. DePasquale argued November 7, 1978.

Similarly, in those cases in which the defendant is retried (because a new trial or mistrial is ordered), it will be difficult to insure the fairness of the second proceeding if the first was televised: many prospective jurors will already know the evidence against the accused, and will already have formed an opinion of the case.

Our experience is that the traditional methods employed to ameliorate the prejudice created by such situations have been generally ineffectual. Changes of venue accomplish little if publicity is wide-spread; and, cameras increase the media's opportunity to reach larger audiences and remote areas. Changes of venue also deny the defendant the important right to a trial in the community where the crime was committed. Voir dire during jury selection has also proven an ineffective tool to combat prejudice, because jurors are naturally reluctant to admit that they are biased, and because it is difficult to explore the degree and pervasiveness of the prejudice without actually reemphasizing to the jury what the prejudicial "event" was. Admonitions from the court to disregard any information already known about the case are difficult to follow, especially if the information is in the form of a confession or tangible evidence implicating the defendant.

Another problem created by cameras is that jury sequestration will be necessary anytime there is a delayed broadcast of a witness' testimony, delayed commentary concerning the trial, or there is coverage of proceedings heard outside the jury's presence. Sequestration is not only extremely costly, but is very inconvenient for the jurors. In trials that last more than several days, sequestration can be so inconvenient as to effect jury deliberations, by giving the jury an incentive to merely "get the case over with."

A third problem is created by televising or photographing only a portion of a trial or of a witness' testimony. Such a procedure potentially places undue emphasis on the proceedings which are covered, and could tend to convey to the jurors the impression that the proceedings not covered were less important.

We would expect that permitting cameras in the courtroom will, as indicated above, introduce a new variety of problems and that the number of mistrials will accordingly increase. Mistrials are costly to the state and inconvenient for the parties, and in some instances, could possibly have double jeopardy implications.

As our comments suggest, we believe the continued use of cameras in the courtroom would not only impair the defendant's interests, but would also significantly increase the costs (monetary and otherwise) of criminal justice administration. Trial and appellate courts would undoubtedly be faced with a variety of legal challenges concerning the use and effect of cameras in the courtroom. Trial judges presiding over televised trials will face additional administrative and supervisory responsibilities. The trial judge will be charged with the duties of (1) establishing, within the guidelines, the ground rules for media coverage; (2) monitoring the media activity during trial; (3) detecting and minimizing any prejudice resulting from the coverage; and (4) sanctioning improper media activity when appropriate. These duties must be performed in addition to the considerable duties already performed by trial judges.

Guidelines can be implemented concerning the use of cameras, but each case will present a unique fact situation, unique procedural problems, and a unique potential for unfairness. It is unrealistic to expect any guidelines to be "self-executing." The media's interest, in fact it's sole reason for existence, is to publicize events considered to be newsworthy. Such an interest directly conflicts with the interests of an accused in a criminal trial. The materials before the Committee indicate that the guidelines promulgated by the Supreme Court, and specific instructions by trial judges, have on occasion been intentionally ignored by media personnel. The materials also demonstrate that some media representatives are generally insensitive to the legal issues presented by camera coverage and not surprisingly, are unsympathetic to the claim that camera coverage can adversely effect trial participants or the rights of an accused.

None of our comments are intended as criticism of the media; rather, we simply recognize that the media representatives have different interests and different perspectives on this issue. We are confident that cameras will rarely be intentionally manipulated so as to achieve a particular outcome at trial. Our major concern is that camera coverage itself will create the risk that an accused will be unable to obtain a fair trial. We obviously cannot "prove" this will happen, but believe this risk is sufficiently real so as to require, at the minimum, further study of the effects cameras might have on trial participants. From our perspective, if one criminal defendant is denied a fair trial because cameras were present in the courtroom, we have paid too high a price for our "right to know."

We thank the Committee for this opportunity to express our position on this matter. If you have any questions concerning our position, please feel free to contact me.

Respectfully submitted,

Robert J. Paul

ROBERT J. PAUL
Deputy State Public Defender

RJP:SDP:jkb

Attachment

# Open Wound: Testimony Ends, Threats Linger

By Dorrea Wetherall
of The Journal Staff

Betty Kilmer is bitter and frightened.

She claims that she and her family are being threatened because she testified as a witness in a murder trial years ago.

"We didn't do nothing but try to help," Mrs. Kilmer said. Now she fears for the lives of her husband, four children and herself.

She said relatives and friends of the two men convicted of second-degree murder for the death June 2, 1975, of Steven S. Carroll, 24, have frequently harassed her family.

Carroll was beaten to death by at least a dozen persons in front of his apartment at N. 10th and W. State Sts.

Jose Sanchez, then 22, and Juan A. Gonzalez, then 19, were found guilty by a jury in February, 1977.

Sanchez was sentenced to 18 years in prison and is at the State Prison in Waupun. Gonzalez was given an open year sentence and is at the Kettle Moraine Correctional Facility. Two other men were charged but were found not guilty.

Carroll was killed after he had first shot at the group of men with a rifle. Police said Carroll was angry because he thought he had been cheated out of a dollar in a dice game with the group.

Mrs. Kilmer, her husband and her two teenaged sons witnessed the killing but only Mrs. Kilmer testified in the murder trial.

Authorities agree that theirs is a potentially violent situation that they cannot much about until someth happens. Mrs. Kilmer she did not want to wait f family member to get hurt.

And she's not going to any more help from the co tim's Witness Protection U The 31½ year old experim tal program that gives support to witnesses who te

Turn to Family, page 8, col.

Family

## Testimony Leads to Threats

From Page 1

in criminal cases expires today.

Milwaukee County Sheriff's Lt. Arnold Nannetti, head of the program, predicted last week that a witness would get injured.

"There's going to be a problem eventually, but what am I going to do?" Nannetti asked. The County Board decided not to finance the program for 1979.

Nannetti said that, because the Kilmers moved back to the same general area where the murder occurred, they could expect harassment.

A Milwaukee police official said last week that the department was aware of the situation but could not offer 24 hour protection for the family.

Milwaukee Dist. Attv. E. Michael McCann said that, although he supports the work of the special unit, he sympathized with the County Board's struggle to control spending.

"Very few witnesses are subjected to threats," McCann said, "and the county is under intense pressure to keep the tax level down."

In addition to the morning telephone calls, the Kilmer family has complained to police of the following incidents:

Mrs. Kilmer's 16 year old son, Kirk, was shot at but not injured early Thursday while at a friend's house nearby. Milwaukee police detectives are investigating.

Two young men armed with a machete and a gun stood on the porch of the Kilmers' West Side home Christmas Day. The Kilmer house was filled with friends and relatives. Threats were exchanged, but no violence occurred.

Mrs. Kilmer's car broke down Thanksgiving Day two blocks from where the murder took place, and she received threats of physical harm.

"We're afraid to walk outside because someone is going to blow our heads off," said Cine Kilmer, her husband.

As she looked around at the family, Mrs. Kilmer said, "If one of them got shot, I'd never forgive myself for what I've done."

The family also fears for its safety in the neighborhood.

Within weeks of Carroll's murder, the Kilmers were forced to move to Oklahoma, Mrs. Kilmer said. They returned to Milwaukee in April, 1977, but after this was over. Since then they have moved four times, hiding out away from their tormentors, they said.

"We've lost everything," Mrs. Kilmer said.

Gene and Betty Kilmer and sons Kirk Dintzler, 15, and Scott Dintzler, 7, said they now live beating, but Mrs. Kilmer said she tried to stop the men.

"They came to blows and that they were going to kill him," Mrs. Kilmer said. But the men only warned her to stay away, she said. That's when she decided that she would testify, she said.

Mrs. Kilmer has feared retaliation for more than two years. But not Kirk. He said he carried a .38 caliber gun with him and would use it if he had to.

"I'm going to shoot right back at them," Kirk said. "We've been pushed around for two years."

When asked what she would do if he could relive the situation, Mrs. Kilmer replied:

"I would help, but I'd walk down before the cops came. And that night that I didn't see anything."

—Journal Photo

Gene and Betty Kilmer and sons, Kirk and Scott Dintzler (right).

## APPENDIX H

## RECOMMENDED REVISED RULES

1. Authority of Trial Judge

(a) These rules of conduct do not limit or restrict the power, authority, or responsibility otherwise vested in the trial judge to control the conduct of proceedings before the judge. The authority of the trial judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by these rules.

(b) The term "trial judge" includes any judicial officer who conducts a public proceeding.

2. Media Coordinator

(a) The Wisconsin Freedom of Information Council shall designate for each administrative district a coordinator who shall work with the chief judge of the administrative district and the trial judge in a court proceeding in implementing these rules. Geographically large administrative districts shall be subdivided by agreement between the Council and the chief judge, with a coordinator designated for each subdistrict.

(b) Where possible, the trial judge shall be given at least five days' notice of the intention of the media to bring cameras or recording equipment into the courtroom. In the discretion of the trial judge, this notice rule may be waived where cause for such waiver is demonstrated.

3. Equipment and Personnel

(a) Three television cameras (film, videotape, live), each operated by one person, are authorized in any court proceeding. Priority consideration will be extended to one of the three cameras to televise an entire proceeding from beginning to end.

(b) Three still photographers, each not using more than two cameras, are authorized to take photographs for the print media in any court proceeding.

(c) The trial judge or the chief judge may authorize the use of additional cameras at the request of the media coordinator in extraordinary court proceedings or may limit the number of cameras where physical circumstances require limitation.

(d) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes must be made through any existing audio system in the court facility, when practical. If no suitable audio system exists in the court facility, microphones and related wiring must be unobtrusive.

(e) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by these rules in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude all audio or visual equipment from the proceeding.

4. Sound and Light Criteria

Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices must not be used in connection with any audio or visual equipment. Only equipment approved by the trial judge in advance of the court proceeding may be used during the proceeding.

5. Location of Equipment and Personnel

(a) The trial judge shall approve the location in the courtroom of audio-visual equipment and operators.

(b) Camera operators shall occupy only the area authorized by the trial judge and shall not move about the courtroom for picture taking purposes during the court proceeding. Equipment authorized by these rules may not be moved during the court proceeding.

6. Courtroom Light Sources

Modifications in the lighting of a court facility may be made only with the approval of the trial judge. Approval of other authorities may also be required.

7. Conferences

Audio pickup, broadcast, or recording of a conference in a court facility between an attorney and client, co-counsel, or attorneys and the trial judge held at the bench is not permitted.

8. Recesses, Periods before and after Court

Audio or visual equipment authorized by these rules may be operated during recess in court proceedings and before and after court, subject to reasonable restrictions imposed by the trial judge to maintain proper decorum and security and to avoid any photography or broadcasting which would impair the right to a fair trial.

9. Use of Evidence

Any film, videotape, photography, or audio reproduction made in a court proceeding as a result of these rules is inadmissible as evidence in any appeal or retrial of the same action.

10. Resolution of Disputes

(a) A dispute as to the application of these rules shall be referred by the trial judge, after making a record, to the chief judge of the administrative district for final resolution. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by these rules any order or ruling of a trial judge or chief judge under these rules.

(b) At the conclusion of a proceeding, the media shall have standing to litigate in the appellate court the validity of decisions made under these rules.

11. Prohibition of Photographing at Request of Participant

(a) A trial judge may for cause prohibit the photographing of a participant with a film, videotape or still camera on the judge's own motion or on the request of a participant in a court proceeding. In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in confession hearings, divorce proceedings and cases involving trade secrets, a presumption of validity attends the requests; the trial judge shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the presumption is not inclusive; the judge may in his or her discretion find cause in comparable situations.

(b) Individual jurors shall not be photographed, except in extraordinary instances in which a juror or jurors consent. In courtrooms where photography is impossible without including the jury as part of the unavoidable background, such is

permitted, but close-ups which clearly identify individual jurors are prohibited. Trial judges shall enforce this rule for the purpose of providing maximum protection for jury anonymity.

12. Inapplicability to Individuals

The privileges granted by these rules may be exercised only by persons or organizations which are part of the news media.

Observer's Report

State v. Patri

The arson trial of Jennifer Patri, 33, of Waupaca, was moved to La Crosse by order of Wood County Circuit Judge Fredrick Fink because of publicity surrounding her earlier trial for murder in Waupaca County.

Mrs. Patri was convicted in December 1977 of manslaughter in the death of her husband, Robert, at their home southeast of Waupaca. She was accused of killing her husband and then setting fire to their house to conceal the killing.

The murder trial and the subsequent arson trial were widely publicized as Mrs. Patri was pictured by her attorney as an example of a battered wife who finally retaliated after years of abuse.

The arson trial, held in La Crosse County Circuit Court Branch 1, started December 4, 1978, with the jury selection. After 2½ days of questioning, 12 jurors and an alternate were selected, and testimony began December 6, 1978. The trial lasted until December 11. Mrs. Patri was found guilty of arson, but the jury of nine women and three men also found her mentally ill and not criminally responsible at the time she set fire to the Patri home. The jury was sequestered.

***

The use of cameras and microphones in the courtroom followed the guidelines established by the Wisconsin Supreme

Court. Arrangements were made by Media Coordinator Jack Marlowe, of WLSU-FM, La Crosse, working with Judge Fink.

RADIO--One audio system for broadcast purposes was used by all local radio stations. La Crosse has three commercial AM-FM combinations and an FM station operated by the University of Wisconsin-La Crosse. The audio system was installed cooperatively by the local stations earlier in the year when the test on cameras and microphones in the courtroom began.

The local stations did not use the audio system for live broadcasting, but made extensive use of it to gather material for newscasts.

In addition, the audio system was used to provide sound to one on-sound TV camera and one video tape camera.

The audio system was unobtrusive, located immediately behind the bar. The system, for the most part, would not have been noticed by jurors, witnesses, the judge or counsel. The only part of the sound apparatus that was visible was the microphones, and the cords. The cords might have been the most noticeable because heavy tape was used to secure the cords to the floor.Five microphones were used: one by the jury box, one for theprosecuting attorney, one for the defense attorney, one for the judge, and one for witnesses.

TELEVISION--There were three TV cameras in the courtroom, the maximum authorized under the guidelines.

WXOW-TV, Channel 19, of La Crosse,had one camera, and was provided sound by the radio audio system. WEAU-TV, Channel 13, of Eau Claire, had a silent camera. Western Wisconsin

Technical Institute, of La Crosse, operated a video tape camera. Sound was provided by the audio system mentioned above. Western Wisconsin Technical Institute (WWTI) offers some technically oriented television courses and does some limited programming over the local cable system operated by Teleprompter. WWTI did not use the video tape camera to do any live telecasting of the trial.(And Channels 13 and 19 did not have live telecasts.)

WWTI did record the entire trial, and the tape is available for review.

WWTI also provided video for three commercial stations. It provided two tapes of courtroom scenes for WFRV-TV, of Green Bay. The tapes were sent by bus to Green Bay. It also allowed WLUK-TV, of Green Bay, to use its camera to make some tapes. WLUK had a reporter in La Crosse for the trial, and had a cameraman in La Crosse at the early stages of the trial.

WKBT-TV, of La Crosse, Channel 8, obtained its video material through WWTI. A line was run from the video tape camera in the courtroom to a small wash closet next to the men's room outside the courtroom. The closet was on the same floor as the courtroom, but across the hall. It would not be visible from the courtroom. Channel 8 recorded the trial in the closet, and used its tapes in parts of newscasts.

Channel 8's recording operation was visible to those in the hallway. But Channel 8 was instructed to turn down the volume when jurors or witnesses used the adjoining men's

room. The Channel 8 reporter was kept informed by bailiffs.

STILL CAMERAS--There were never more than two still cameras in the courtroom (as specified in the guidelines), but photo coverage was not limited to two newspapers. The La Crosse Tribune, Waupaca County Post, Minneapolis Tribune, Milwaukee Sentinel and Coulee Gazette (La Crosse community weekly) were represented at the trial. Photo coverage in newspapers was light, apparently. The La Crosse Tribune used two pictures during the trial. The Milwaukee Sentinel used one--provided by the Associated Press.

***

Overall, the media equipment did not appear to be obtrusive; at least not anymore than it would elsewhere, such as in City Council chambers. The microphones for the audio system could have been taken for microphones for a court sound system; still cameras did not appear too bothersome. The long cords necessary in the audio system were noticeable, but did not appear too unsightly. They were taped down and did not appear unsafe. Perhaps the most noticeable were the TV cameras. All three were on the left side of the audience part of the courtroom. The video tape camera was in the extreme left aisle. The other two were set up among the front benches, primarily where the press was seated. The judge and witnesses looked directly at the cameras. The defendant and counsel (if seated) had their backs to the cameras. The jury normally

would not look directly at the cameras. However, the cameras were easily visible, especially when jurors were looking at counsel, rather than the witnesses. My observations indicated that the jurors did not pay much attention to the cameras; at least not anymore than they looked at other things in the courtroom (such as spectators walking in during testimony). Two of the cameras were quiet, but Channel 13 had an older model that was somewhat noisy. The jurors, perhaps, could not hear it, but spectators could--and the courtroom is relatively small.

The media representatives appeared to work under the guidelines once the trial was under way. There was only one major problem, and that came during voir dire. It was soon settled, and I am not aware of any others.

Prospective jurors were questioned in a room behind the courtroom and near the judge's chambers. The room was not visible from the courtroom. Alan Rappoport, reporter-cameraman for WEAU-TV, Channel 13, wanted to get pictures of prospective jurors during questioning. He said he had gone beyond the bar to get pictures of veniremen seated in the jury box while others were being questioned in the room. He said that he thought that pictures could be taken because the court was in recess--with the judge and counsel away. Others, he said, had taken pictures when the court was not in session. Judge Fink (see his answer to Question 11) also cited the cameraman

as taking pictures at the doorway of the questioning room. Judge Fink did not want the room being panned. Judge Fink confiscated the film taken of the prospective jurors.

Rappoport suggested that in the future it be made more clear when court is in session, and when it is not, and what "the limitations are."

Following the incident, defense counsel made a motion to ban cameras from the courtroom, but Judge Fink denied it.

Joseph Zobin,
Court Observer
February 24, 1979

## Judge Frederick Fink of Wood County (Wisconsin Rapids)

QUESTIONS TO BE ADDRESSED TO THE JUDGE

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record the name of the judge and how long he has served as a judge; also note which of the three media were used in the trial: (a) television cameras; (b) radio equipment; (c) still cameras)

**TV, radio and still cameras were present**

1. What, if any, influence do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on you during the trial?

**Apprehension. I've got a much-publicized trial; tried to get a jury in the other place (Waupaca County) and there was tremendous pressure. And I had never worked with cameras in the courtroom.**

2. Did the presence of (a) television cameras, (b) radio equipment, and (c) still cameras seriously increase your supervisory responsibilities?

**Yes. It does. No question. You've got to keep an eye on them to assure they are following the guidelines, in addition to other things you have to supervise.**

3. If your response to question 2 was in the affirmative, did those responsibilities interfere with your principal duties as a presiding judge?

**Not substantially.**

4. Did the presence in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras produce more letters, telephone calls, et cetera, then you usually receive?

**I can't answer that.**

5. What, if any, impact do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on the witnesses?

**I think there is always some ham in every human being and a tendency to play up to the media is there. And I'm concerned. I didn't see much of this [in this trial]. I saw some in the aborted trial in Waupaca.**

**NOTE: Judge Fink wanted to answer this as an all-inclusive statement that applies to all parties--counsel, witnesses, and others, and not just to witnesses.**

6. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the behavior of counsel?

Very definitely, yes. To some counsel, it doesn't make a difference. To some, in varying degrees, it makes a tremendous amount of difference.

7. What, if any, problems occurred because of the use of (a) television cameras, (b) radio equipment, and (c) still cameras in your courtroom?

I didn't really have a problem; I had the problem contemplated. I confiscated some film. This is in the area of picking a jury. You may have to reach out to another panel. This panel is out there and watching TV. It becomes harder to pick a jury. In the preliminary phase, it may be necessary to prohibit TV cameras and still cameras.

8. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

I suppose I can answer that hypothetically. If a particular counsel wants to glean publicity from a trial that has publicity merit, then he can milk it for all it's worth. I'm not saying it was done. It can be done. I don't know how you can be certain it's happening.

9. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

I don't think I can answer that. The jury brought back a verdict. I can't say that it had an effect.

10. What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

There, again, I can't answer the question. I would hope it didn't have any effect.

11. Describe any requests you received for the prohibition of (a) television cameras, (b) radio equipment, and (c) still cameras, the action you took based on those requests, and the reason(s) for your action.

Defense counsel--at the opening of the trial--asked that all cameras and radio be prohibited. I asked him his reasons and he said his client felt it would be detrimental. He gave no reasons, so we followed the guidelines of the Supreme Court. When we were voir direing individuals, an attempt was made by TV to photo part of this. I had seated the juror so her back was to the door. He (the cameraman) wanted to pan [the room]. I refused. I said they could take pictures from the doorway. I wanted as little of the jurors' faces on TV as possible. I may have been too lenient. Maybe I should have prohibited [all cameras at this time].

NOTE: Questioning of panel members took place in a room behind the main courtroom.

12. Overall, what is your general evaluation of the use of (a) television cameras, (b) radio equipment, and (c) still cameras, in the courtroom?

On still cameras: With advances [in technology], no objections, provided the cameraman is not obnoxious.

On radio: I can't see any objections as a news medium. If it could be used for challenges in the court--there are too many ways it can be doctored--I can see objections. I saw in Waupaca and here that older courtooms do not lend themselves [to having all this equipment]. There are cables all over and you are stumbling over it. You will have problems from an operational standpoint. You don't have room.

NOTE: The judge also mentioned the safety factor.

Television: Here, I feel a danger to a fair trial in the initial and preliminary hearings--in the initial stages of a trial, especially when it has been highly publicized (and you don't have TV unless it has been highly publicized). It can make it very difficult to get a jury [that is impartial]. The trial judge should be given a great deal of discretion [at this stage]; it is an area frought with danger. Once you've got a jury picked, I can't seen anything wrong with television in the courtroom.

**Defense Attorney: Alan Eisenberg, Milwaukee**

QUESTIONS TO BE ADDRESSED TO COUNSEL

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Be sure to identify lawyers as to whether they were appearing for defendants or as prosecutors)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

**They didn't distract me at all; but three jurors, in voir dire, said they felt the cameras were a distraction... Because one newsman violated the rules.**

2. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the strategy of litigation you intended to use?

**I felt that the judge was less publicly abusive because of it. Therefore it was a help.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the manner in which you examined or cross-examined witnesses?

**Zero**

4. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on your contacts or relationship with the judge?

**See above. He was less abusive than in the first [patri] trial.**

Did (a) television cameras, (b) radio equipment, and (c) still cameras result in producing more telephone calls, letters, etc., than you usually receive?

No.

6. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

Before the trial three [Jurors] said it would be a distraction. You would have to ask them now. I don't know.

7. What effect, if any, did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

Zero

8. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

Zero. Maybe a help, because it kept the judge from getting publicly abusive. Therefore, it was helpful.

9. Overall, what effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I felt it was helpful. It inhibited the judge's abuse. This is speculation on my part. I don't really know if that was an inhibiting factor.

10. If you had a choice, would you have preferred to try the case with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

With. It keeps everybody honest.

11. What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

It keeps people from getting abusive. Both the prosecutor and the judge would have been caught in the act by the camera.

**Prosecuting Attorney: Philip Kirk, assistant district attorney, Waupaca County**

QUESTIONS TO BE ADDRESSED TO COUNSEL

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Be sure to identify lawyers as to whether they were appearing for defendants or as prosecutors.)

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

**It didn't distract me at all.**

2. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the strategy of litigation you intended to use?

**Absolutely none at all.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras affect the manner in which you examined or cross-examined witnesses?

**None at all.**

4. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on your contacts or relationship with the judge?

**I don't think it affected it at all; there was not that much contact.**

5. Did (a) television cameras, (b) radio equipment, and (c) still cameras result in producing more telephone calls, letters, etc., than you usually receive?

Well, I would say during the course of the trial, I had quite a number of calls, but I don't know if they resulted [from the equipment in the courtroom]. It was the substantive nature of the trial [and the news] disseminated by the media. There was a built-in interest factor.

6. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

In questioning [to get a jury] a few said they felt it was a distraction, but not a single one indicated it...would interfere with being able to make a fair decision. I would think that once the trial began, they would be more aware of the equipment than I was because of the positioning. When they looked at counsels' table, they saw the equipment; I didn't.

7. What effect, if any, did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of the trial?

None, because there was never an instance where there [was a delay] because the equipment wouldn't work. The only dilatory situations were indigenous to this trial.

8. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the outcome of the trial?

I would like to say none, but I might hedge to a degree. Since the jurors were isolated, they were not exposed to [media reports] I think the fact that they were there indicated the significance or importance of the trial, and might have been a signal [to the jurors] to be more scrutinizing and careful to come up with a decision.

9. Overall, what effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

To me, the trial was fair. I think that the evidence both sides wanted to present was presented.

10. If you had a choice, would you have preferred to try the case with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

No difference to me. My presentation was based on what I wanted to elicit from the witnesses. There was no concern. I made no changes. It was something that was there, and that was it.

11. What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

I don't think there were any advantages to have TV cameras in the courtoom to attorneys, judges or jury. I think the advantage in having the equipment was to disseminate as accurate an account as possible of what happens in a courtroom to the public. People have such little appreciation of what happens in /criminal matters/; there may be misconceptions. This is very good for that. It can be very educational. Certain witnesses and defendants would be against it...but it can be very educational.

## Harold Bauer, Waupaca County sheriff's deputy

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

**Investigator, called by the state**

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

   **I imagine somewhat.**

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

   **No effect. They put you more ill at ease than you are /normally/.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

   **None. I don't live in the area /where the trial was/.**

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

   **Without.**

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

   **I couldn't answer that. You would have to ask the jury.**

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

   **I don't know. In many cases, it would be so well publicized that if there was a re-trial, it would be hard to get a jury that was not informed.**

Lawrence Schmies, Waupaca County Sheriff

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

investigator, called by the state

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

You are a little conscious of the cameras. It is a little bit like when someone says, "I want to take a picture," and you straighten your tie. It takes away from the natural testimony. You are more conscious and you try to avoid slang (like ain't). You try to sound reasonable and half-way decent to the public.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you? I don't know if it would. I tried to keep it short and precise...and /not/ open new fields. I don't think it had an effect on the length. Most /law enforcement agents/ are trained to give straight, simple and direct answers.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

I don't think any from the cameras. I did receive some letters from California and Colorado from people who read stories in newspapers. They had the same name and wanted to know if our forefathers came over on the same boat.

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom? It makes no difference. In this case, we were not being dramatic. The defense attorney was; that's his style. Most law enforcement /agents/ don't try to get dramatic; just give direct, simple answers.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

Well, a picture's worth a thousand words. He's (defense attorney) got a product he's selling to jury. It does carry an effect--not on the jury, but on the public. But, I don't know. I don't see any harm to it.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

I think a lot would depend. Every case is not alike. Some will incite the public; some inflame. It depends on the case. If it disturbs the public, no. If there is human interest, yes..... It didn't bother me. We try to be simple and direct. It makes you conscious; cuts out a lot of foolishness.

The Rev. Richard Mundt, pastor of Emmaus Evangelical Lutheran Church in Weyauwega

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

reference, called by defense

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

   Mildly so. I was aware of them, and mildly bothered, but that's it.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

   Made no difference at all.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

   Nothing.

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

   I would say without.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

   I have no idea. I didn't really consider that. I just don't know.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

   It makes people more uneasy. I'm not sure whether it should be allowed; that's up to the court. It makes people nervous.

Dr. John Mulvaney, psychiatrist from Marshfield

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

expert witness, court-appointed psychiatrist

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

Oh, I suppose to some degree. I felt it was not just me. It had an effect on the entire proceeding. I had a negative feeling. The proceeding is more important than the publicity. Newspaper and TV people had a detrimental effect; and not just in the courtoom. I was not in favor of it. I didn't think people should be on exhibit. It's enough of a circus without making it public.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you? I don't think it affected it too much that way. My answers were determined by the questions. They /the questions/ were not adequate to express my viewpoint.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

It didn't. I wasn't on TV. My testimony was later and they were more interested in the decision than the people. I got some comments before the trial.

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom? Without. I feel my /appearance/ was an obligation to the psychiatric community and I was not interested in demonstrating for publicity. TV makes it a public exhibition.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

You would have to ask the jury. I don't know what affect it had on the questions that were asked me; ask the prosecutor and the defense attorney.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

It doesn't have to be there. The court doesn't have to justify to the public that it is doing right; it doesn't have to apologize to the public. I don't think putting witnesses with instability will make them more stable. It may be a disservice. When a witness has a problem with stability, it won't make him more comfortable.

Mr. Jean Clark, assistant fire chief of Weyauwega

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

invetigator, called by state

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

   Just in an unreasonable delay while they were argueing about having it [equipment in the courtroom].

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

   None

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

   None

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

   I don't think it makes much difference.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

   I don't know.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

   I don't think it should be allowed. Too much publicity is put one these trials.

Herbert Loehrke of rural Weyauwega

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)
Had sold house to Patris' and was owed money; called by state

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

Really none.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

Mine was just a testimony of fact; nothing would distract me much.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

None

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

Preferred that they were gone---out.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I couldn't really say. People in that area got the wrong impression of the lady.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

I really don't believe they belong there.

Mr. Leslie Meyer, state fire marshal from Weyauwega

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

investigator, called by the state

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

I didn't notice them while testifying.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

None at all.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

Just this one.

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

It doesn't matter to me, either way.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I would be hard pressed to give an answer. I can't conceive how it would affect the fairness of a trial, as long as they were kept unobtrusive and don't creat problems for the jury.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

I wouldn't think I would have an evaluation. I haven't really studied it.

Dr. Kathryn C. Bemmann of Waukesha, psychiatrist

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

Expert witness, called by defense

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

   I did not feel uncomfortable. I was not aware they were there. I was doing my thing.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

   On a conscientious level, I was not playing to them. If it was on an unconscientious level, I was not aware. I don't think it had /any effect/.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

   I suppose some people saw me and commented. But because it was so far away /from where I practice/, I would say it was not a very great influence. On a scale of zero to 10, about a 2; nothing hostile.

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?

   I don't think I have a choice.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

   I feel it did not affect the fairness of the trial.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

   I think that overall a lot depends on how obtrusive the cameras /are/....Overall, for me, it was a neutral experience; neither positive nor negative.

Dr. Anna Campbell of Elm Grove, psychologist

QUESTIONS ADDRESSED TO WITNESSES

If additional space is needed for your answer, please attach sheets and number each answer.

(Note to observer: indicate the nature of the witness, e.g. whether the complaing witness, the defendant, an expert witness, a casual witness, etc.)

expert witness, called by defense

1. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?

   I'd say not at all.

2. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the length of your answers to questions put to you?

   I'd say no effect; none.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras result in your receiving telephone calls, letters, etc?

   I received none, so it must not have had any effect.

4. If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom? From the perspective that it is valuable for the public to have awareness of what is going on in the courtroom, I would choose to have TV equipment there; not because of the affect, personally, but because it's valuable for the public.

5. What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

   I think it had no effect at all. The jury was sequestered and couldn't see it.

6. Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

   I think if it was done as in La Crosse--with the cameras stationary and unobtrusive at the rear of the court--it's fine. It could be done obtrusively, but it was not.

Mrs. Jacqueline Bartlett

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

Initially, I was quite aware, and bothered. But after the third day, I was not even aware of it.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

None

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I don't think that much, especially the professional people.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I would say probably none as far as the state /attorney/. It seemed to me that Jennifer's attorney kind of was on stage; he was using theatrics. Maybe that's just his delivery. He seemed dramatic...for the benefit of TV.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

None

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I don't think it had anything to do with the fairness.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

I guess I would have to say I would rather it had been without. It seems cameras have a tendency to sensationalize things. /The media/ could have gotten material for a factual report without /the cameras/ in the courtroom.

Mrs. Elaine Betz

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

It didn't matter that much. We knew they would be there, and that was it. I didn't think about it.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

It didn't have any on our deliberation.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

Nothing, as far as letters or phone calls. A friend said she'd seen me on TV, after I got home.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I didn't even think about it then. I was so intent on what they were saying that I didn't think about it.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I don't think ithad much to do. Mr. Eisenberg was always flamboyant. But not knowing him, maybe he's always flamboyant. I don't think they even thought about it.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't think they bothered him at all.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I doubt it had anything to do with the way [the case] was decided. It made no difference at all.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

It would make no difference. I was so intent on what was going on that I didn't give it a thought at all.

Mrs. Marian Boyle

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

We knew they were there; we could see them moving up and down. It was sort of distracting. The newspaper people were moving, too; they were no worse than the newspaper people.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None at all

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

Haven't had any

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I can't say. Most professional people seemed to be at ease. Some were nervous. It could just be being on the witness stand; can't say.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I don't think it affected the prosecutor any. But Jenifer's lawyer, I thought a lot of what he did was affected. Maybe he would have been that way anyway. He was very effected, but maybe he was doing ti just for the jury. This is the only trial I have seen him.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't think any.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I don't think it had any effect at all.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

I think without.
(Her overall observation):
I think they [radio and TV equipment] somewhat distracted [jurors] but not to the extent that would have affected our coutcome.

Mrs. Leona Choate

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

Didn't bother me. Knew they were there. Didn't interfere with the proceedings; they were in the rear.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

Didn't make any difference.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

Not any.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

Most of the witnesses were...professionals and used to it. I don't think it had too much effect.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

Well, it was kind of publicized. It may have had a little effect /to/ emphasize their point.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't think it bothered him too much. At one time, before the trial, someone came forward and he said that was not permissable. He was concerned that they abide by the rules.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I don't think it had any effect.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

This my first time on a jury. I was so interested /that I/ kepy my eyes forward. It didn't really bother me; I wasn't concerned.

Mr. Glenmore Eggum

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

I realized they were there.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None, whatsoever.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

None.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I don't think it bothered them at all.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

It might have affected the defense a little; the other, it didn't make any difference.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

None, whatsoever.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I don't believe it bothered the trial at all.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

Immaterial to me.

Mrs. Eva Farris

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

I knew they were there.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None, as far as I was concerned.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

I have had none.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I think it did have some. I know at times when some went up, you could tell they noticed the cameras. With gestures and facial expressions, yes.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I think at times they became very upset that the cameras and broadcasters were there. I am thinking of two instances in particular.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

They didn't seem to bother him when they were within the assigned areas. When they were not within, he became very upset.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

No effect. I knew nothing of anything until everything was brought out. I was unaware of anything about it. No effect on me.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

Made no difference to me.

Mrs. Jacqueline Holmes

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

I knew it was there, but it didn't bother me.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None. We did not see TV, newspaper or radio coverage.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

I got one call from a reporter the night I got home. A lot didn't know I was on it (the jury).

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I don't think it had any. Once called upon, they couldn't talk /about the case/ until dismissed.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I think so; yes. At least on one part; he (the defense attorney) was very dramatic.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

He wasn't pleased with them. I don't think he wanted them in there. He was rather upset with them.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

We didn't hear; we couldn't see...so what we saw /ourselves/ that was it.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

I don't think it would make any difference. I really don't. You would have news media anyway, and pictures in the newspaper, but really no difference. I think if people could see this on TV, they could tell better /what happens in court/ than from just a newspaper.

Mr. Frank Kitson

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

You knew they were present all the time.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

Nothing that I knew of. One reporter called after the trial, but that was not related.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I would say, yes; they played to the cameras.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

Very much. Dramatized a lot of places where it was not necessary; were on an ego trip.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't think it had any.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I don't think it affected the trial or jury at all.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

I'd have been better off without /it/; it wouldn't have been dragged out; a lot was unnecessary; they were palying to the cameras. Cameras, per se, didn t bother me, or the others. I can see both sides. But it lengthened the trial.

Mrs. Helen Nelson

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

It really didn't bother me.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

I don't think any, whatsoever.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

None.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I don't really know. None that I noticed.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I don't think it ordinarily would have affected her lawyer. He was a bit more flamboyant than most lawyers.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't believe any, that I noticed.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I don't believe any.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

I had never been on a jury before. Didn't bother me; I shut it out of my mind. It didn't bother me, but I can see where it could bother some.

Mrs. Beverly Pralle

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

When the trial was going on, I was oblivious to them. When we came back in /to the jury box/ you'd say, "Oh, the cameras are there," but I got too absorbed to notice them.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None at all.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

I didn't have experience like that at all.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I don't know. I don't think it bothered anyone. It may have bothered some on the jury, but after the first day, you got used to it.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I just don't think either one performed for the cameras. They were trying to impress the jury rather than the cameras. Mr. Eisenberg was very colorful. I don't know him; that's probaly his way; it was not for the cameras.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't think it was affected by the cameras.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

Cameras didn't have a thing to do with it. They were there and part of the background. I hope they didn't; they didn't me. They didn't affect the fairness.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

They didn't bother me. I was so absorbed, I forgot them. They were not very obtrusive.

Mr. James Shoults

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

I'd say very aware.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

Not any.

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

I would say nothing. I haven' received any. A lot of people did know I was on the jury by seeing me on TV.

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

This was really the first trial I ever saw, so I don't know. I don't think it had very much

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I don't think it had any effect.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I don't think there was any. Although there was a time when he kind of blew up; other than that, none.

*****

(NOTE: The "time" referred to involved a news photographer going where he wasn't supposed to go.)

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

It didn't have any effect.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

Oh. I think without.

Mrs. Sandra Wheat

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

I was not aware as long as they stayed behind the /bar/; when they didn't, they were obnoxious. More /aware/ as they walked back and forth to the judge's chambers. Wasn't aware at all during testimony. They made a noise, but it didn't bother me.

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

None

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

None

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

I wasn't a witness, but I noticed a couple of times people looked around (at the jury, attorneys and jury). The ladies arranged themselves more decorously than otherwise.

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

I wasn't a lawyer. One played it up and one was inhibited by it. But that's my opinion; not fact.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

I wasn't the judge, you'd have to ask him. As far as I could discern, none. I didn't know him; he's not from here.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

I must say some effect, and simply because one (attorney) was flamboyant and knew how to use it to his advantage. He might have done that anyway, but he used the resources at hand and used them to greater advantage than the other.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

It didn't bother me. It lent some excitement--and to some upset stomachs in the jury room, and hotel. You were more aware that you were doing something important /with the press coverage/. There was no ill effect, as far as I could discern; it didn't affect the judgment or the thinking.

Mrs. Kathleen Donskey (alternate)
She sat with the jury throughout the trial.

QUESTIONS TO BE ADDRESSED TO JURORS

If additional space is needed for your answer, please attach sheets and number each answer.

(Note for the observer: Please record whether the trial results in an acquittal, a conviction, or a mistrial)

1. To what extent, if any, were you aware of (a) television cameras, (b) radio equipment, and (c) still cameras during the course of the trial?

**Very little.**

2. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon your deliberations in the jury room?

**Mine, none. I was an alternate.**

3. To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras in your receiving phone calls, letters, etc. during or after the trial?

**No, I did not.**

4. To what extent, if any, do you think that (a) television cameras, (b) radio equipment, and (c) still cameras had any impact upon the behavior of the witnesses?

**Not much, if any, that I could notice. They forgot they were there.**

5. What effect, if any, do you think (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of counsel?

Not any on Kirk. Eisenberg's probably like that on or off.

6. What effect, if any, do you believe that (a) television cameras, (b) radio equipment, and (c) still cameras had upon the behavior of the judge?

None.

7. What, if any, effect did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?

No effect, one way or the other.

8. Overall, if you had a choice, would you have preferred to be on a jury with or without (a) television cameras, (b) radio equipment, and (c) still cameras?

It didn't bother me, one way or the other. On some cases, if you feared retaliation, it might be different. I forgot they were there; it didn't affect me.

Washington State Superior Court Judges' Association Committee on Courts and Community, "Cameras in the Courtroom -- A Two Year Review in the State of Washington"

CAMERAS IN THE COURTROOM--
A TWO-YEAR REVIEW IN THE STATE OF WASHINGTON
A Project of the Washington State Superior
Court Judges' Association Committee on
Courts and Community

On September 20, 1976, the Washington State Supreme Court authorized "broadcasting, televising, recording, and taking photographs in the courtroom during sessions of the court. . ." (Code of Judicial Conduct 3A(7). It is noted that the authorization was granted by an amendment to the Code of Judicial Conduct not by court rule.) Since that time judges of the Washington State Superior Courts have had varied experiences with CJC 3A(7) and the news media. This report attempts to present an overview of those experiences and to recite certain relevant statistical information.

PRELIMINARY COMMENTS

All 111 Superior Court judges responded to the survey by the Washington State Superior Court Judges' Association's Committee on Courts and Community. Out of the 111 judges 41 reported experience with some form of camera or recording equipment in the courtroom during a court session. Seventy judges reported having no experience. The statistics are not clear as to how many judges refused to allow "cameras in the courtroom" when requested by the news media. There is evidence that some judges denied requests by news media for a variety of reasons. There is also evidence that judges allowed news media cameras in the courtroom, but, because of an objection pursuant to CJC 3A(7), the court restricted the news media from filming or photographing a defendant, witness or juror.

In most such occasions, the news media people decided not to proceed with the filming or photographing.

Judges reported that generally the more sensational criminal trials attracted the news media, but also there appears to have been coverage of a variety of other court matters. Examples of matters covered include sentencings, arraignments, contested divorce action, announcing an opinion in an affirmative action case, legal arguments concerning pornography, a dispute between state penitenitiary guards and Department of Social and Health Services, injunction relief, summary judgment regarding school issue, intra-political party dispute, motion calendar arguments and zoning disputes. Judges also reported there was coverage of a traffic appeal, a civil trial involving "clear cutting of timber", a civil trial involving "liability/damages of nine adjoining land owners versus an auto race track", and a variety of other situations when the news media gathered educational or background material.

At least 60 occasions of news media equipment in the court can be documented by the survey. Some judges reported TV cameras, still cameras, or recording equipment in the courtroom during a number of arraignments or preliminary matters without giving the exact count. The survey indicates at least 60 news media appearances in court and probably no more than 80 during the nearly two-year period of review.

NEGATIVE RESPONSES

Of the 41 judges reporting at least one experience with the news media equipment in the courtroom, only seven reported a negative experience.

One negative response stated the equipment was "obvious" but not noisy and that the equipment "had the effect of creating un-

realistic posturing and extended, long-winded arguments. Each counsel departed from the legal issues frequently in an attempt to upstage the opponent.. .recommend greater restrictions than presently in the Rule."

One comment considered negative in the statistics cited above stated that the judge had "mixed reactions" about the cameras in the courtroom on two different occasions.

A local bar association criticized one judge for allowing even limited TV camera and still camera coverage of a murder trial. Although the judge stated he did not "have any particular difficulty" he was concerned about the strong reaction by the bar association and indicated he may be slow to grant permission in the future.

A differentiation between extended hearings and brief hearings was made by one judge. He stated that during the long hearing which lasted for several days, one TV camera and tape recorder "were not disruptive" and that "all media personnel were cooperative."

On the other hand, he stated that on a brief hearing, "multiple cameras and recorders. . .did adversely affect the dignity of the court" and he indicated reservations on allowing media equipment in the courtroom during brief matters.

One judge commented that he believed the "movie cameras" in the courtroom during a trial (by approval of the Supreme Court before the amendment of CJ3A(7)) affected the verdict. After another experience recently with video tape recording equipment in the courtroom during a trial, the judge stated, "I have changed my mind." In addition, he commented that even if the cameras in the courtroom did affect the jury verdict, he was not sure that was inappropriate since

ke judicial decisions, jury verdicts should also be held up to close public scrutiny.

Another judge stated that TV cameras had been in the courtroom for 15 minutes for "background shots". The judge expressed an opinion that "the camera could and probably would be distracting to witnesses and jurors. I also believe jurors could be intimidated in a criminal case knowing defendant's friends could identify them from showing of film."

The final negative comment was an extended report of an experience during a bizarre murder trial which occurred shortly after Canon 3 was amended. The multiple news media people were criticized for squabbling about camera position and prerogatives. The judge was of the firm belief that the news media coverage did distract and had a detrimental affect on the proceedings.

The judge stated:

> "The continuous awareness of their continuous presence was observable. In the court's judgment, the conduct of counsel, jurors and witnesses were affected by the cameras in court. The court was affected and felt a continuous pressure from the newspaper reporters and TV cameras. Whether this was observable in the court's conduct has not been reported to me. I cannot define the reason for feeling the pressure. Perhaps it is derived from a fear of exposure to publicity. A judge has no script and must perform perfectly on the spot and fears humiliation from public exposure of a hasty and perhaps inappropriate ruling or comment. . .
>
> "Whether it was real or not, at 3:30 or 4 o'clock in the afternoon of each day, when all the cameras and reporters were absent from the courtroom, it seemed as if there was a general easing and relaxation of previous tension, and a sigh of relief seemed to breathe through the crowded court."

POSITIVE RESPONSES

On the positive side, 34 judges had a good reaction to news media equipment in the courtroom. Although the degree of enthusiasm

tried, the predominant comment was "no problem".

"Very successful, educational to general public, no distraction", recited one judge after two experiences with TV camera, radio and still cameras in the courtroom during murder trials.

Another judge, commenting on a first degree murder trial with a jury, (jurors not photographed), stated: "Camera noisy but did not cause problems."

TV cameras and still cameras were used during arraignment and other preliminary proceedings before one judge and it was reported, "It hasn't presented any real problems yet."

Also frequent comments by judges praised the cooperation given the court by the news media. Judges appeared to be very appreciative for this cooperation and "sensitivity".

Perhaps the most positive comment was made by a judge who tried a first degree muder case which attracted considerable public attention. The trial lasted for four weeks and the jury was sequestered. The judge reported that TV equipment with microphones were present daily in the courtroom and, in fact, the judge permitted the microphones to be wired in place for the duration of the trial. In addition to TV cameras, there were still photographers, sketch pad artists, and a second stationary TV camera. At the conclusion of the trial, the judge had this following comment:

> "Due to the length and amount of publicity this trial received, I was exposed to virtually every type of media 'onslaught' and feel that I gained a great deal of experience in this area as a result. Almost without exception, the media personnel were beyond reproach and the overall experience a very pleasant one. The few disruptions, if they can be called that, were clearly accidental and hardly worthy of mention. As a result

of this experience, I am 100% in favor of allowing the media access to the courtrooms under our current guidelines. I would suggest that any judge who anticipates having cameras in the courtroom, take the opportunity before trial to casually discuss the set-up with the camera men or reporters so that it is clear that both sides understand the other's position on that particular case. I did and found this to be very beneficial."

The succinct comment of one judge perhaps summarizes the general overall response. The judge stated: "Generally good experience--some problems."

GENERAL COMMENTS

No pattern of abuse or non-cooperation by the news media has developed and no inundation of state courtrooms by the news media has occurred.

Also, additional restrictive guidelines have not surfaced as necessary. Since the judge has the final say, open communication with the news media allows the flexibility to meet the unique needs of each situation. Judges have not reported a need for further guidelines than set forth in CJC 3 7(a) and news media people have generally preferred the freedom to deal directly with the judge on a case by case method.

To date, there has been no finding or serious claim that "cameras in the courtroom" actually prejudiced a party. A few judges have voiced the opinion, however, that such reporting has complicated the trial and caused distractions that may have prejudiced the defendant or state in a criminal trial.

Judges who have had experience with news media equipment in the court generally have less apprehension about disruption or distraction than those who have not had first hand experience. Also, most judges seem to accept the prospects of cameras and recording

equipment becoming more than a novelty in the courtroom. Judges, however, are concerned that in an arena which requires a judge to be the guardian of numerous fundamental rights of a defendant, one more distraction demanding the judge's attention increases the possibility of reversable error and unnecessarily intensifies the pressure on the judicial system.

On the one hand some judges believe it is good for the judicial image and it will help create a better public understanding of our court symtem. Others, however, claim the primary purpose of the courtroom is to provide each defendant with a fair trial and the education of the public or the increased news media access to the courtroom are secondary considerations.

It is this uneasy--but not necessarily unhealthy--tension between the fundamental right to a fair trial and the fundamental right of free press that causes most judges to adopt an open--wait and see--position.

CONCLUSION AND RECOMMENDATIONS

Two years have produced some initial data concerning the affect of news media equipment in Washington state courtrooms. Although it is too early to make a final judgment on the issue, the data at this point appears to support a continuation of allowing cameras in the courtroom.

The Courts and Community Committee should continue to monitor "cameras in the courtroom" activity and serve as an information gathering task force for trial courts. The committee should make periodic reports to the judges for information purposes and encourage continued consideration of this important constitutional matter.

Judge James A. Noe
9/11/78

## APPENDIX

SURVEY SUMMARY TABLE OF CAMERAS IN THE COURTROOM

| | | |
|---|---|---|
| 1. | Number of Superior Court Judges Surveyed and Responses Received (100%) | 111 |
| 2. | Number of Judges Reporting No Experience | 70 |
| 3. | Number of Judges Reporting at Least One Experience | 41 |
| 4. | Number of Positive Responses (included in #3 above) | 34 |
| 5. | Number of Negative Responses (included in #3 above) | 7 |
| 6. | Number of Total Experiences Reported | 60 - 80 |

WASHINGTON STATE SUPERIOR COURT JUDGES REPORTING AT LEAST ONE EXPERIENCE WITH NEWS MEDIA EQUIPMENT IN THE COURTROOM DURING A COURT SESSION:

1. Judge Gerry Alexander, Thurston-Mason County
2. Judge Frank Baker, Thurston-Mason County
3. Judge Dennis J. Britt, Snohomish County
4. Judge William L. Brown, Jr., Pierce County
5. Judge Robert J. Bryan, Kitsap County
6. Judge Warren Chan, King County
7. Judge Harold D. Clarke, Spokane County
8. Judge Carolyn R. Dimmick, King County
9. Judge James J. Dore, King County
10. Judge Barbara Durham, King County
11. Judge Marshall Forrest, Whatcom County
12. Judge Harry Follman, Skagit County
13. Judge William C. Goodloe, King County
14. Judge Bruce P. Hanson, Yakima County
15. Judge Alan Hallowell, Cowlitz County
16. Judge Hewitt A. Henry, Thurston-Mason County
17. Judge Howard Hettinger, Yakima County
18. Judge Nancy Ann Holman, King County
19. Judge Erle Horswill (deceased), King County
20. Judge Daniel T. Kershner, Snohomish County
21. Judge Bill Kohls, Okanogan-Ferry County
22. Judge Thomas Lodge, Clark County
23. Judge James I. Maddock, Kitsap County
24. Judge Jim Mitchell, Walla Walla County
25. Judge J. Dean Morgan, Clark County
26. Judge James A. Noe, King County
27. Judge Donald N. Olson, Spokane County
28. Judge Howard A. Patrick, Island-San Juan County
29. Judge Richard G. Patrick, Benton-Franklin County
30. Judge Norman W. Quinn, King County
31. Judge George H. Revelle, King County
32. Judge Jack Scholfield, King County
33. Judge Gerard Shellan, King County
34. Judge John Skimas, Clark County
35. Judge Horton Smith, King County
36. Judge Stanley C. Soderland, King County
37. Judge Fred Staples, Benton-Franklin County
38. Judge Waldo F. Stone, Pierce County
39. Judge David W. Soukup, King County
40. Judge Robert Winsor, King County
41. Judge Albert J. Yencopal, Benton-Franklin County

SUMMARY OF JUDICIAL DISTRICTS AND NUMBER OF JUDGES WITH EXPERIENCE:

| | |
|---|---|
| Benton-Franklin | 3 |
| Clark | 3 |
| Cowlitz | 1 |
| Island-San Juan | 1 |
| King | 16 |
| Kitsap | 2 |
| Okanogan-Ferry | 1 |
| Pierce | 2 |
| Skagit | 1 |
| Snohomish | 2 |
| Spokane | 2 |
| Thurston-Mason | 3 |
| Walla Walla | 1 |
| Whatcom | 1 |
| Yakima | 2 |
| Total | 41 |

Washington Bench-Bar-Press Committee,
Subcommittee on Canon 35, Report,
April 5, 1975

(Some of the pages in this report were partially cut off when photocopied. This is the form the report was in when received by counsel for the amici.)

BENCH-BAR-PRESS

-- Report of Subcommittee on Canon 35
-- For Review by Committee-of-the-Whole
-- April 5, 1975, Broadcast House, Seattle

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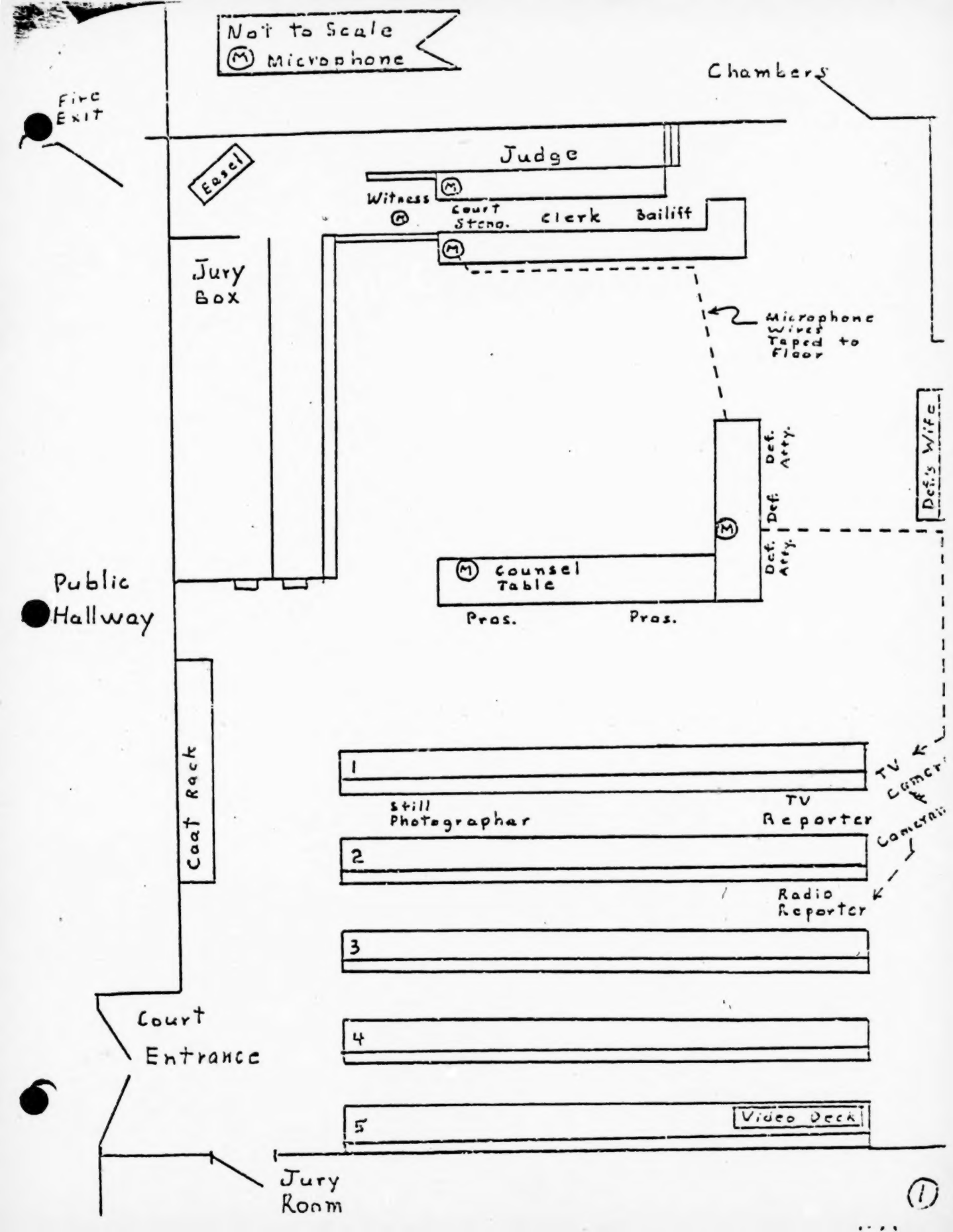
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Easel
Judge
Witness
Court Steno.
Clerk
Bailiff
Jury Box
Microphone Wires Taped to Floor
Def.'s Wife
Def. Atty.
Def.
Def. Atty.
Counsel Table
Pros.
Pros.
Public Hallway
Coat Rack
1
TV Camera
Still Photographer
TV Reporter
2
Camera
Radio Reporter
3
4
5
Video Deck
Court Entrance
Jury Room
(1)

# NARRATIVE SUMMARY

At its meeting on November 10, 1973, the Bench-Bar-Press Committee of Washington voted to ask the State Supreme Court to "authorize a temporary abandonment of the rule against use of cameras in the courtroom to permit experimental test recording by television and radio of a trial or trials".

The Supreme Court, on November 28, 1973, adopted such a motion, and the then Chief Justice, Frank Hale, acting both in his court capacity and as chairman of the Bench-Bar-Press Committee, asked Presiding Judge Stanley C. Soderland of the King County Superior Court to select a criminal trial suitable for such a test.

Chief Justice Hale named a special Cameras-in-the-Courtroom Test Subcommittee to work with Judge Soderland. Members were:

Paul Conrad, Chairman
Judge Charles Horowitz
Judge Frank H. Roberts
Camden Hall
E. Glenn Harmon
James A. Murphy
Professor Don R. Pember
Henry MacLeod
Howard C. Cleavinger
Norman Heffron

Judge Soderland over the ensuing months sought a trial that would be appropriate as to public interest, and in which the parties and counsel were willing to waive assignment of error which might be based upon the conduct of such a test.

A trial meeting these criteria was located, and in November, 1974, the Cameras-in-the-Courtroom Test Subcommittee made its final preparations.

At 9:00 A.M., Monday, December 2, 1974, Judge Soderland convened State v. Fetter in Room E-847 of the King County Courthouse. The case, No. 69484, involved a charge of negligent homicide. Thomas Dean Fetter had been the driver of a car which struck a car on a rural highway near Enumclaw in south

King County on July 19, 1974. Allan Swanson, driver of the second car, was fatally injured. A passenger in the Swanson vehicle, Phyllis Haynen, was injured.

Assistant King County Prosecuting Attorneys Roy Howson and William Bailey represented the state; attorneys Byron Ward and Charles Burgeson of Auburn represented the defendant. Bailiff for the trial was George Bowman; the court reporter Anne Duncombe.

At the start of the trial microphones had been placed and a videotape camera set up in the second row of spectator seating, at the far right as the audience faces the bench. Operators were George Diedrich and Bill Galanti, both of CCTV, the closed-circuit television system at the University of Washington. Videotape recorders were placed on the rear benches, and the camera recorded essentially all the proceedings of the first day.

Also present for the opening session was Bill Ostlund of the Federal Way News, equipped with Fujica and Pentax single-lens reflex cameras which he operated from the second row of seating.

Prior to start of voir dire, Judge Soderland noted to all present the presence of the television camera, and explained that it was part of an experiment. He stated that the camera's presence and operation had no bearing on the trial, which was to proceed without regard to the experiment. He gave no further explanation then or later of the purpose of the test or what use might be made of the work product.

During voir dire one of the defense counsel once pointed to the television camera and commented that it represented an experiment, "but we are not here to experiment with the defendant's case, are we?". Other than this singular incident, the presence of the camera was not further mentioned by the court, counsel, jurors or witnesses during the remainder of the proceedings.

During the first afternoon as voir dire was completed and the first witnesses were called, Seattle Times photographer Bill Heyza replaced Bill Ostlund as the still photographer, employing Leicamats. Bryan Johnson of KOMO Radio taped portions of the proceedings.

Observers present on the first day included Judge B. J. McLean; Judge Frank Roberts; attorneys Howard Pruzan, George Bovingdon and Lawrence L. Longfelder; and press representatives Norman Heffron, James Murphy, Hu Blonk, Donald Pugnetti, Henry MacLeod, ~~and~~ Paul Conrad, Howard Cunningham.

On the second day (Tuesday, December 3), during which additional witnesses were called, a camera crew from KING-TV operated a film camera, filming those portions which reporter Julie Blacklow felt were potentially newsworthy. During the morning her cameraman was Phil Sturholm; during the afternoon Craig Johnston. The camera was located in the same second row position.

Still photographs were taken by Bob Miller of the Seattle Post-Intelligencer employing a Nikkon camera. Again Bryan Johnson of KOMO Radio taped portions of the testimony.

In addition to several of the observers who had been present on the first day, Don Pember and Roger Simpson of the University of Washington School of Communications were present, as was Gene Gisley of the Bremerton Sun.

On the third day, during which testimony was concluded, a crew from KOMO-TV employed an Orocon film camera, again capturing only such footage as seemed to the reporter John Sandifer to have news potential. Camera operator was Darrell Benedict. Howard Scott, KOMO-TV news executive, was also present.

Taking still photographs was Don DeRosa of The Seattle Times, using a single-lens reflex camera on a tripod.

On the final day of the trial, which included final arguments, instructions to the jury, and the verdict (guilty), the proceedings were filmed by a crew from KIRO-TV. Reporter was Craig Barrick and cameraman was Roger Gabhard, using a CP-16 film camera. Bryan Johnson was present to tape portions of the proceedings, but no still photographers attended this session.

Following their appearance on the stand, witnesses were interviewed as to their reaction to the cameras. These interviews were conducted outside the courtroom or following the conclusion of the day's proceedings. Test Subcommittee members and Judge Soderland shared the responsibility of conducting the questioning, some of which was recorded on television film. The following questions were asked:

1. What was your initial reaction when you saw television equipment in the courtroom?

2. Did you remain conscious of the operation of the television equipment during your appearance as a witness?

3. Were you aware of the operation of tape recorders by news media people during the trial?

4. Were you aware that still photographs were being taken by news media personnel during the trial?

5. Did any of this photographing or news recording distract you or interfere with keeping your full attention upon the trial? If so, what was it that was distracting?

6. Did the presence of the equipment and its use have any effect upon your conduct during the trial? If so, explain.

7. Did you observe any indication that the equipment and its use had an effect upon any other participant in the trial? If so, explain.

At the conclusion of the trial eleven members of the jury were interviewed by Judge Roberts, asking essentially the same questions. All of the juror interviews are recorded on television film.

Witnesses and jurors uniformly responded that they were not distracted by the presence and operation of the cameras, and that they saw no evidence that other trial participants were affected in any way by the cameras.

Judge Soderland also interviewed counsel, whose responses were recorded on video film.

Witnesses called were:

* Clyde Sprague, who lives near the accident scene;
* Bruce Sprague, son of Clyde Sprague;
  State Trooper Edward L. Smith, accident investigating officer;
* State Trooper E. J. Petersen, fatality investigating officer;
* Phyllis Haynen, passenger in the Swanson car;
* Mrs. Verle Brown, bartender at Carolyn's tavern;
  Frank T. Christman, who saw defendant in the tavern prior to the accident;
* Mrs. Carolyn G. Wicks, who heard defendant drive away from the tavern;
* Douglas Andrew, who saw vehicles leave the tavern;
  Theodore W. Couts, who saw the accident vehicles prior to the collision;
* Steven Coons, metalurgical engineer with a Kent laboratory;
* Dr. Terry Turner, a consulting physicist;
* Rob Wills, Enumclaw tow truck and storage yard operator;
  Thomas Dean Fetter, the defendant.

(*) Interviewed

...ers were:

1. Gerald Jensen
* 2. Susan Bruce
* 3. James Rasmussen
* 4. John Bernard
* 5. Robert Crandell
* 6. Larry Crane
* 7. Sandra Schimming
* 8. Edna Etchison
* 9. Clifford Rowe
* 10. Robert Stowell
* 11. Mary Hoover
* 12. Janice Mamgen

(*) Interviewed

c:a
2/20/75

JAN 27 1975

Superior Court of the State of Washington
for the County of King

Department of Presiding Judge

King County Court House
Seattle, Washington 98104

January 24, 1975

Mr. Paul R. Conrad
Chairman
Cameras-in-the-Courtroom Test Committee
18740 Pacific Highway South
Seattle, WA 98188

Dear Mr. Conrad:

Here is a brief report of my views of the recent trial which was covered by the press and cameras.

I think all judges and lawyers who viewed the case were surprised at the minimal or nonexistent distraction caused by the camera and news media. We have been trained to expect disturbances and distractions from such coverage of a trial. My feeling was that all of the participants in the trial went about their business and almost completely ignored the presence of news coverage. I was paying particular attention to the news personnel and camera in order to be able to make this evaluation. Accordingly, I looked at the camera many times when I was not otherwise occupied. However, I found that I completely forgot the presence of the news media as soon as I was called upon to take some action. Participants in a trial get so absorbed in what they are doing that the presence of a camera is going to fade into the background.

The use of this type of coverage gives the news commentator a much more forceful tool than is now available. The commentator can, of course, still editorialize and emphasize as is presently possible. For good or for bad, however, the news commentator will be able to make

a much stronger impression on the public with this type of coverage. I feel that in the long run this will be very good for the court system. It will be helpful to let the public see what actually goes on in a courtroom. The public will be more sympathetic with the courts and the problems when they understand them better. There are certain areas where the judge or a court rule is going to have to exercise control if news media are going to be allowed into courtrooms. For example:

1. Means of protecting the integrity of the jury process where publicity may cause prospective jurors to be prejudiced.

2. News media pooling arrangements.

3. Requiring news media to remain unobtrusive and to be ready to start on time or not at all.

4. Protection of certain types of witnesses such as sex offense trials and undercover agents.

5. Judicial control in cases where someone might want to use a trial simply as a vehicle for publicity, political or otherwise.

Very truly yours,

Stanley C. Soderland

SCS:mw

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FEB 4 1975

February 11, 1975

The Honorable Stanley C. Soderland
Presiding Judge of Superior Court of
the State of Washington for County of King
King County Courthouse
Seattle, Washington 98104

Dear Judge Soderland:

In reply to your letter of January 24, 1975, I am happy to respond with my comments regarding the recent trial wherein the press was invited to attend.

It is my personal feeling that the camera crews and the press personnel present in the courtroom during the entire period of the trial did not hamper me personally as a defense lawyer in my duties and job which I had set out to accomplish.

The cameras were of little consequence to me and I do not feel that their presence was disruptive nor did they disturb my concentration or train of thought during the trial.

As in most cases, many of us tend to have 20/20 hindsight and in that respect there are perhaps a few things I would have done differently in retrospect; however it certainly cannot be visited upon the press.

The quality of the trial was in my opinion in no way diluted by the presence of the press or the cameras. I felt that the court maintained complete control over the courtroom and proceedings at all times, and that counsel both for the state and the defense were able to present their cases without interruption or disturbance from any outside source.

(9)

One comment that I would make is in regard to whether or not juries are prepared to make this transition into the public eye.

With the upswing in crime as it exists today, and more particularly with the emphasis on crime prevention and deterrents, I feel it may be difficult for a juror (being a member of his or her local community) to sit on a criminal case of any magnitude without feeling the ever present pressure of public opinion regarding accused criminals.

Perhaps this may be of little import; however, I do feel that it is a matter which must be taken into consideration by defense counsel in preparation of his case.

In closing, I wish to thank you and the Bench-Bar-Press Committee for having afforded me the opportunity of being a part of this experiment and I sincerely hope that I was able to make some sort of contribution in this regard.

Very truly yours,

CHARLES A. BURGESON

CAB:fg

KOMO

RADIO 1000 • abc

Report on trial experiment:

At first I was among the skeptics. I was afraid that television cameras might distract, whereas radio equipment, being compact, could be secreted. Thus it was in the back of my mind that the experiment could hurt radio.

I also had passing fears that coverage of a criminal trial might hold more inherent risks than covering a civil proceeding.

My fears proved groundless. Not only did the jurors and attorneys indicate no ill effects, but the television cameras were all but unnoticed.

Can radio and television use the same basic court equipment?

Yes. With some advance planning. On the first day there was the video tape equipment. Radio was able to capture usable sound merely by putting a microphone to the earphones of the equipment. A more elaborate sound system might have yielded better quality, but it was air quality.

On the second and third days there was no problem simply hooking alligator clips to the headphone output of the Auricon campras. The sound was excellent. The only problem occured on day four. Channel 7 uses molded jacks on the headphones and there was no way to tap the sound. This could have been corrected easily if the equipment of all stations were examined prior to the start of the trial. The radio stations obviously depend much more on audio than television. When one can see a person talking,

FISHER'S BLEND STATION, INC.
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there is a natural tendency to help the person speaking by lip reading. This can't occur in radio.

There is no logical way to make all sound usable.

The judge will remember on one occasion it was necessary to pass a note requesting he lower one of the microphones.

That was only when the sound became totally unusable.

The court and bar will have to recognize that choice of samples for inclusion in broadcasts will be limited not only by the inherent interest of the material but also by the quality of sound.

The following would be needed in any continuing experiment.

A black box to mix the sound from microphones, four microphones, cables, and an adaptor box to handle the various types of output material.

It seems to me that a decision to go ahead with the project should include a decision by the stations to buy such equipment and warehouse it at the courthouse, rather than relying on each station to provide such equipment.

There may well be occasions on which only radio would be interested in a particular case, this would pose tremendous problems because of the lack of such gear at radio stations.

Any determination to go ahead should thus be for both radio and television for reasons of economy as well as the demonstrated fact that television does not include any special disruptive influence

Tape examples of sound are availabbe, but illustrate little other that purely technical problems which can be heard by closing one's eyes while watching the film.

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98105

January 24, 1975

Mr. Paul R. Conrad
18601 Pacific Hgihway South
Seattle, Washington 98188

Dear Mr. Conrad:

The Closed Circuit Television Department at the University of Washington provided the television camera for recording the first day of the courtroom test on videotape. There were four hours of videotape recorded which was edited into a thirty minute summary of the day's events.

The overall evaluation from our standpoint of the recording session was good. We allowed ourselves two hours to transport equipment and set it up in the courtroom. This time turned out to be adequate, but if problems had developed during the set-up, we may not have been ready. So more time may be necessary for set-ups of this type. It took three people to get the equipment ready for the record.

Our biggest concern was placement of microphones. We used four microphones and had good pickup from all areas except the jury. No lights were used and the video quality was good. The trial was recorded on ½" Sony videotape.

The editing took two days to complete. The edited program consisted of shortened segments of the day's activity placed in chronological order.

Some comments concerning the project. First of all, pre-planning and preparation is essential. Coordination with other people involved is also necessary. It has to be determined if more than one group will receive an audio or video feed from the same equipment. Also, to make sure proper cables are available to go from one set of equipment to another.

Videotaping in the courtroom could be used for educational purposes as well as informing the public via newscasts. I believe the major use of television cameras will be by educational institutions with the commercial stations using film cameras. I also believe that the final product disseminated to the public or to students can be influenced by the people supervising and doing the editing.

I do favor the use of cameras and microphones in the courtroom. It will allow for a more accurate and an interesting way to cover the courtroom for the public as well as having a teaching tool available for schools.

Sincerely,

George Diedrich
Producer/Director

GD:mb

ALLIED DAILY NEWSPAPERS

18740 Pacific Highway South
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Seattle, Washington 98188

PAUL CONRAD
Executive Director
Telephone (206) 248-0770

February 20, 1975

MEMORANDUM TO : Cameras-in-the Courtroom Test Subcommittee

RE : Comments on the Test

By and large the presence of television and still cameras in the courtroom had no more impact on the jurors, witnesses, judge and counsel than the presence of other spectators and the accouterments of the courtroom.

Cameramen conducted themselves with decorum, and the equipment was not so noisy as to intrude on the proceedings. The test established that videotape cameras are virtually silent, while film cameras make an easily audible but not intrusive hum. The single lens reflex cameras used by the press photographers are surprisingly noisy, but not to the point of distracting.

The most serious flaw in the test related to television crews being set up and in place at the start of a session. On one occasion the camera was not in the courtroom at the time the judge was ready to assume the bench, and he delayed his entrance into the courtroom long enough for the camera to be set. On another occasion the operators were not at their places.

On one occasion the television reporter could be heard ordering the camera-man to turn the camera on for a bit of testimony which apparently the re-porter felt would be particularly significant. Audible orders like this could distract the jury and influence their attention to particular testimony.

Still photographers, the test revealed, are accustomed to taking a great number of exposures in their quest for a particularly good picture. Since this inevitably means that they are moving about -- albeit in a limited area of the spectator benches -- this activity can be distracting.

These observations suggest the need for ground rules to be followed by camera crews and photographers to minimize disruption of the court proceedings.

PAUL R. CONRAD, Chairman
Test Subcommittee
c:a

Washington State
Association of
Broadcasters

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Donald Whitman
KITN, Olympia
KITI, Centralia

Joe Chytil, ex officio
KELA AM-FM, Centralia-Chehalis

March 20, 1975

Mr. Paul Conrad
Executive Director
ALLIED DAILY NEWSPAPERS
18601 Pacific Highway South
Seattle, Washington 98188

Re: Bench-Bar-Press
Subcommittee on Canon 35

Dear Paul:

After attending the full State v. Fetter trial, and seeing the various participants' and monitors' reports, I find they leave very little to add by way of report that is new material. One thing is missing from other reports which I feel does deserve comment.

That is that the three commercial stations' TV news clips were made under very realistic conditions - almost more than realistic. First, reporters knew absolutely nothing of the facts of State v. Fetter except that it was a negligent homocide case arising out of an automobile accident. In "real life" reporting they would know a great deal more about the case before they went to the court in the first place - or they wouldn't be there. The film clips and news stories were obtained entirely from the actual trial itself. In my opinion the journalistic professionalism demonstrated by three unrelated (in fact competitive) TV crews, and story continuity with no background facts, speaks very highly for the quality and capacity of the electronic journalists to cover courts in progress.

(15)

Secondly, the three stations put their three stories "in-the-can" the same day as filmed just as they would in their daily reporting endeavors. The films were given no special editing because there was a test case to be carefully studied. For example, KING-TV's Julie Blacklow left the courtroom at 12:10 after her first morning, set-up immediately outside Judge Soderland's courtroom and "filed" (filmed) her report of that morning's court session. That "hallway" report is the filmed news clip.

Finally, rather than duplicate what the other monitors and participants have stated from their and my one trial experience, I submit the attached 1962 report on Colorado's Six Years' Experience without Judicial Canon 35, by Justice Hall of the Supreme Court of Colorado, 48 Am. Bar Association Journal 1120 (1962).

Yours very truly,

James A. Murphy
President

JAM/to

# Colorado's Six Years' Experience Without Judicial Canon 35

**In 1956, the Colorado Supreme Court adopted a rule permitting judges in that state, at their discretion, to permit the taking of pictures in court or the broadcasting or televising of courtroom proceedings. In this article, Justice Hall reports that the new rule is working well and that there have been none of the dire consequences that were predicted when the rule was adopted. The Colorado rule, of course, allows what Canon 35 of the American Bar Association's Canons of Judicial Ethics forbids. Canon 35 has been under heavy attack from some quarters, and a Special Committee of the Association is now studying the problem to determine whether the Canon should be changed.**

by Frank H. Hall • *Associate Justice of the Supreme Court of Colorado*

MUCH HAS BEEN said and written pro and con concerning American Bar Association Canon 35 governing Judicial Ethics. It has been and remains the subject of heated debates ranging from matters of proper procedure to constitutional questions of free speech, free press, fair trial, public trial, etc.

Prior to February 27, 1956, Canon 35 was one of the Canons of Judicial Ethics of Colorado. On that date the Supreme Court of Colorado deleted Canon 35 from its Canons of Judicial Ethics and substituted therefor its Rule 35, which is a rule of court adopted for the guidance of all trial judges. It provides:

> Proceedings in court should be conducted with fitting dignity and decorum.
>
> Until further order of this Court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.

Prior to replacing American Bar Association Canon 35, the Supreme Court of Colorado conducted hearings, saw and heard modern means of photography, recording and television. An account of these preliminary steps together with a survey of the legal aspects of the problem is reported in 132 Colo. 391, 296 P. 2d 465.

It is not my purpose to argue the legal phases of the problem—the rights of parties litigant, the rights of those engaged in gathering and disseminating news, the rights of witnesses and of courts, but rather to make a factual report of the actual operation under our Rule 35.

Colorado trial judges have for the past six years been governed by Rule 35. It is no longer in the experimental stages, but is a part of our judicial process. History records its working: the judiciary, lawyers, litigants, witnesses, news media agents and the public have for six years been exposed to its benevolence or malevolence.

## *Justice Douglas States the Objections to Rule 35*

On May 10, 1960, I was privileged to hear the fourth address in the John R. Coen Lecture Series sponsored by the University of Colorado Law School at Boulder, Colorado. The subject "The Public Trial and the Free Press" the speaker, Mr. Justice Douglas of the

Supreme Court. (His ... was published in full in the ... 1962), *American Bar Association Journal*—16 A.B.A.J. 819—and ... December, 1962, issue of the *Mountain Law Review*, published by the University of Colorado.)

On that occasion Justice Douglas pointed out what he considered as the many grave dangers inherent in any modification or relaxation of Canon 35. With respect to the action of the Colorado Court in deleting Canon 35 and substituting our own Rule 35 he stated:

> With all deference to the Supreme Court of Colorado I feel that a trial on radio or television is quite a different affair from a trial before the few people who can find seats in the conventional courtroom. The already great tensions on the witnesses are increased when they know that millions of people watch their every expression, follow each word. The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization ever witnessed such a spectacle. The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth.

With six years of experience behind us, I think it may be stated that none of the ominous possibilities that filled Mr. Justice Douglas with so grave apprehension have come to pass in Colorado.

During that period there have been several television broadcasts of portions of criminal trials of wide public interest—the most notable that of John Gilbert Graham, who paid the supreme penalty for planting a time bomb on an airplane on which he had put his mother so she might enjoy a well-earned rest and vacation. She and forty-three others met their frightful deaths when the bomb exploded shortly after the take-off. Liberal portions of the trial proceedings were televised and viewed on numerous channels covering the Rocky Mountain area and other portions of the United States.

Canon 35 admonishes that such actions "are calculated to (1) detract from the essential dignity of the proceedings; (2) distract the witness ... giving his testimony; (3) degrade ... court; (4) and create misconceptions with respect thereto in the mind of the public. . . ."

### *Colorado Rule Preserves Courtroom Decorum*

One may view and hear this telecast without a consciousness of degradation or distraction—for certainly it gives a true picture of the persons and things viewed and a true record of the voices and sounds. Truth is not *per se* objectionable. One can find nothing (and I have heard of nothing) indicating that there was a particle of detraction from the essential dignity of the proceedings. Nothing appears therein to indicate that any witness was distracted in giving testimony—no witness has been heard to complain. Did this telecast degrade the court? Those participating in the proceedings might well demand proof of such charges. The visual and auditory recording speaks the truth: it shows a competent judge and prosecuting attorney; competent defense counsel; witnesses; and a jury charged with a frightening task, all concerned with their public duties in an orderly, dignified, efficient and legal manner. Did it create misconceptions with respect to the court? Only true conceptions could arise from viewing the telecast. If misconceptions arose, they had their root in other sources—the telecast spoke the truth.

We have experienced no difficulties with reference to Rule 35. Though the rule has not received the blessing of the American Bar Association, we have not been urged by anyone in interest to modify or repeal any portion of it. Naturally judges make no complaint, for they have the discretion to grant or refuse permission to take pictures, broadcast by radio or to televise all or any portion of a court proceeding. If permission is granted, the trial judge has complete and final control over the methods pursued, the extent thereof and all matters in connection therewith. The rule provides ample protection for witnesses and jurors who object to photography or broadcasting. Up to the present time, no complaints have been received from litigants, lawyers, jurors or witnesses. The Colorado Bar Association, not integrated but an association composed of 85 per cent of the licensed attorneys in the state, has never expressed dissatisfaction with the rule during the time it has been in force. It is fair to assume that such an association would long ago have taken steps to restore Canon 35 if any of the dire forebodings predicted upon its abandonment had become manifest in Colorado.

During the past six years there have been hundreds if not thousands of photographs taken in courtrooms throughout the state—some during recesses of the court, others during the proceedings, a vast majority of them taken without the knowledge of any person in the courtroom. Such pictures appear regularly in the newspapers and form an integral and essential part of stories covering trials in matters of public interest. The pictures speak the truth. I have seen none to indicate that the trial was lacking in fairness, that the proceedings lacked essential dignity, that the court was degraded or any witness distracted. They do not depict a mob scene or indicate that any defendant was in need of "protection

Rogers-Hopwood, Inc.

Frank H. Hall is an Associate Justice of the Supreme Court of Colorado and was its Chief Justice in 1961. He is a graduate of Colorado College and of the Harvard Law School (A.B. and LL.B.) and has had thirty-six years' experience in the practice of law in Colorado.

from the mob"—one of the fears expressed by Mr. Justice Douglas.

Canon 35, it would seem, is designed to protect the judiciary against tyrannical and unscrupulous photographs, broadcasters, televisors and others who gather and disseminate news. Generally speaking, it would seem that those responsible in the news media of Colorado are not bent on doing any of the things which Canon 35 undertakes to prevent.

### *Press Has Not Abused Its Privileges*

Conduct of the Colorado press and the courts in making use of the freedoms acknowledged by Rule 35 have, in my opinion, done nothing to indicate that the fears expressed by Mr. Justice Douglas are well grounded.

On the contrary, the press has promulgated its own rules for radio and television broadcasting of court proceedings. These rules might be regarded as canons of ethics for news media. They evince high ideals and standards recognized by the fourth estate in making use of the privileges recognized by Rule 35.

The rule provides for pooling of all broadcasts, and all stations are granted the privilege of participating, and the information obtained is available to all members of the pool for dissemination. Never is there more than one camera or recording device in any courtroom. The whole matter is under the control of the judge. Generally speaking our judiciary, and no doubt the judiciary of sister states, is composed of splendid, honest lawyers interested in preserving the dignity of the court, well qualified to resolve the problems presented and to guard against the sinister inroads dogmatically predicted by Canon 35. The final test as to whether a court is degraded or lacks essential dignity as the result of operation of the Rule rests with the presiding judge, and of course courts will not rise above the quality of the presiding judge. Canon 35 will not serve as a substitute for judicial ability, integrity and dignity.

The public is interested in court proceedings as evidenced by bar association sponsored television programs involving courtroom scenes and by commercial broadcasts of simulated trials. Teachers bring whole classes to observe the proceedings in trial courts and oral arguments in the Supreme Court. Capitol guides bring hundreds of tourists to witness such proceedings —I have never seen or heard anything from these persons that has been in the least distracting; they do not detract from the dignity of the proceeding or degrade the court. We enjoy having them and feel that they have gained something from their visit—we have lost nothing.

If thousands of others who are unable to attend court proceedings in person could see the same thing on television, it would serve to give the public a better understanding of the judicial process.

Colorado judges and those agencies which gather and disseminate news through the press, pictures, TV and radio have worked harmoniously for six years under Rule 35. The public response has been favorable. Protests are nonexistent. The judicial processes by virtue thereof should be better understood.

The press have been scrupulous in conforming to the judges' wishes and have exercised their rights and privileges in the best traditions of their profession. If they were to transgress, the judges have ample remedies available.

DEC 1 9 1974

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December 17, 1974

. Paul Conrad
lied Daily Newspapers, Inc.
740 Pacific Highway South
attle, Washington 98188

ar Paul:

reaction to the cameras in the courtroom at the State v. ter trial was basically favorable. I was surprised to d that the equipment for the TV, especially when they were ng film, was so quiet. I had expected a hum or something a buzz, which I did not notice at all. In fact the clicking a still camera by the press photographer seemed more noticeable.

did not see any effect on any of the participants with the sible exception that one juror seemed at one time to glance r. I was present one afternoon when Judge Soderland inter- wed witnesses after the jury had been excused for the day. y were uniform in saying that they did not feel any impact tsoever from the cameras.

de from the operation, there were two items which bothered a little. Hugh Blonk told me that in setting up the TV aratus one morning the cameraman was late and as a result, ning of the trial was delayed. I think that is inexcusable. the operators cannot make their arrangements without inter- ing in the trial in any way, including delaying it while y set up apparatus, they should be required to wait until next recess when the jury is absent.

other item was the young attorney for Fetter inquiring of cameraman whether he (the attorney) should stand here or e or somewhere else in interrogating the witnesses so the raman could get a better shot. This seems to me to come

December 17, 1974

close to the kind of posing or performing by the attorney which I think we are all opposed to. The trial should be entirely free of all implications of this sort.

I undertook to inquire of George Bovingdon what his reactions had been and he kindly passed along a copy of his letter to Judge Soderland on the subject which I enclose. George's last comment that it must be observed the photographers were on their best behavior is a proper caution. We did have trouble many years ago when, after we had a pretty good start in the King County court, one of the photographers (this was before the time of TV) had seen too much of "the front page" and came barging into the courtroom quite obstreperously giving a very bad impression to one of the judges who had been skeptical of the whole thing from the first. I am afraid there are some representatives of the media who become so much impressed with their own importance that they forget the necessary consideration for others. The boys and girls on the regular courthouse runs have learned the lesson but those going in on occasional special assignments sometimes forget.

Sincerely yours,

Dick Todd

Charles H. Todd

CHT:sb

Enclosure

...G. CLARKE, 1878-1945
...GE W. CLARKE
...D G. (TED) CLARKE, JR
ROBERT B. ALBERTSON
GEORGE H. BOVINGDON
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December 4, 1974

The Honorable Stanley C. Soderland
Judge, King County Superior Court
Room E942, King County Superior Courthouse
Third & James
Seattle, Washington 98104

Dear Judge Soderland:

You invited me to attend the trial of State v. Fetter for the purpose of observing from the vantage point of a civil defense attorney, the effects, if any, of having cameras in the courtroom.

I did not attend continuously as I explained to you upon your invitation. A point came when I discontinued attending for reasons which I think will appear. I first came into the courtroom on Monday, December 2, 1974, about 10:30 a.m. after completion of other business in the courthouse. At that time the court was engaged in voir dire examination of jurors. I remained until about noon. At 1:55 I returned to the courtroom and voir dire was continuing consequent upon the exercise of peremptory challenges. Simply in order to place the matter in focus, jurors 9, 11 and 12 were being repeatedly exchanged at this time. Ultimately juror No. 12, Mrs. Mangen, was seated. She appeared to be somewhat attentive to the camera when she took her seat in the box. I was present during the opening statements of counsel in the afternoon of Monday. It will be recalled that both counsel in opening statement, from time to time used the easel. I noted that in each instance where this was done, all the jurors swung around and paid very close attention to counsel. On resuming counsel's station in the opening statement, the jurors swung back but none seemed to turn anywhere except to focus attention upon the counsel addressing them. The remainder of December 2, 1974 was occupied with the testimony of Trooper Smith, during which time there were some still pictures taken. It would be

appropr[illegible]te here to state that the still pictures were the only pictures taken on Monday that made any sound whatever. The camera in use on Monday made no sound whatever, and I thought until the recess and talking to Mr. Murphy that it was not in use. The still camera made a click from time to time. I made a point of watching jurors and witnesses when these clicks occurred. At no time did I notice any reaction whatever. During the first part of the testimony of Trooper Smith, a number of exhibits were admitted, and I observed that the jury's attention was focused completely on this operation and none at all, that I could see, upon any camera.

On the morning of December 3, 1974, I arrived at the court about 9:50. Trooper Smith was still on the stand, and if my recollection is correct, he was on cross-examination. I noted at this time, as in fact I noted the previous day, that the witness Smith paid no attention whatever to cameras, listening to and watching only the counsel examining him. At 10:10 in the morning the witness, Clyde Sprague, was on the stand, a local resident who testified briefly. He appeared not to be even aware of the camera that was in the courtroom nor of the still photographer. He was followed by the witness, Phyllis Hamer (sp?), the passenger in the other vehicle. Possibly owing to her emotional state, but at any rate for whatever reason, she paid no attention to the camera. Pearl Brown certainly paid no attention to the camera. Her attention was mainly focused on fencing with defense attorney. She was followed by a man whose name I did not record, but who was in the same tavern the defendant was in, and offered to make up the 7¢ purchase price of the beer, and who testified to hearing statements made by the defendant Fetter. I could not see any effect or influence upon him by the cameras, either still or television. It should be noted that on the second day there was a different camera and that it did make a whirring sound to those close to it. I would estimate it might have been heard as far as the counsel table. I could not guess how much farther away it would have been audible. At any rate, it did not appear to affect anybody.

I concluded to discontinue attendance as I could not see that anything had occurred which would require close observation. I must say that I am surprised at what I did observe. I had always assumed that this activity would be disruptive in a courtroom, and consequently had been opposed to the idea. I do believe it must be observed that the people conducting the activity were on their best behavior and were, I thought, making an effort to be unobtrusive. Whether this would always be the case is open to question.

I hope these remarks may be of service to you.

Very truly yours,

Clarke, Clarke, Albertson & Bovingdon

George H. Bovingdon

GHB:jk

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H S SANFORD
OF COUNSEL

January 3, 1975

The Honorable Stanley C. Soderland
Room E942 King County Court House
Seattle, Washington 98104

Re: Camera Coverage of Trial

Dear Judge Soderland:

At your request, I attended several sections of the trial of the negligent homicide case at which camera coverage, both still and television, was permitted on an experimental basis. The purpose of this letter is to report my observations and reactions.

Due to the nature of my schedule, most of the periods of my attendance were in connection with the preliminaries of the trial and jury selection. I also had an opportunity to watch the testimony of several witnesses giving rather brief testimony.

The most remarkable impression that I received was the apparent lack of interest and concern shown by the jury toward the picture-taking process. One would think that if any part of the trial was somewhat repetitious and uninteresting, the voir dire would so qualify. It seemed especially significant, therefore, that even during that portion of the trial I saw no members of the jury giving any more than a passing glance at the television camera or still pictures being taken.

It is a little difficult for one not more familiar with the case than I to evaluate the effect of the presence of the cameras upon witnesses, but I saw no noticeable difference in their demeanor or the way in which they responded to questions.

I assume that my sole role is to report on what I observed. However, I would make one caveat. The above observations are based upon the presence in the courtroom of only one television camera and not more than one or two still cameras. The situation might well be otherwise if an unlimited or larger number of television and still cameras were permited to operate at will.

I consider to be outside of the scope of my observations the intangible consideration of the chance that the presence of live press coverage would tend to increase the effect of public opinion or what might be discerned by the jury as public opinion upon jury deliberations.

If I can be of any further assistance, please do not hesitate to call upon me.

Respectfully yours,

HOWARD P. PRUZAN

HPP/rs

LAW OFFICES
DANIEL F. SULLIVAN

DANIEL F. SULLIVAN
LAWRENCE L. LONGFELDER
JOHN W. FLYNN
OF COUNSEL

HOGE BUILDING · 2-6 & CHERRY
SEATTLE, WASHINGTON 98104
TELEPHONE MUTUAL 2-8813

December 6, 1974

The Honorable Stanley Soderland
Judge of the Superior Court
King County Courthouse
Seattle, Washington 98104

RE: Haynen v. Fetter and State v. Fetter
Cause No. 783449

Dear Judge Soderland:

I am writing in response to your request that I provide the court with my view of the proceedings and the effect, if any, that I observed of the press coverage of the negligent homicide trial of Mr. Fetter.

My interest in this case stems from the fact that I represent Phyllis Haynen, who was a passenger in the vehicle driven by Alan Swanson, the decedent, which was hit head-on by Mr. Fetter. I was attending this trial for several days. We have commenced a civil action against Mr. Fetter for the injuries sustained by Ms. Haynen in the accident and I was interested in observing the testimony of several of the witnesses, including my own client. I was also interested in the theories of how the accident occurred as presented by his defense counsel.

My time records indicate that I observed this trial for approximately nine hours over the course of December 2, 3, 4 and 5. My observations included the voir dire of the jury, opening statements of counsel, testimony of several of the state's witnesses and approximately one-half hour of closing argument by deputy prosecutor Howsen.

In all candor, I was not particularly concerned with paying attention to the presence of the news media in the courtroom,

but more with the actual testimony and the proceedings. However, it did not appear to me that the jury had any great interest in the filming or in the still photographers after the initial jury selection had completed. I think there was a natural reaction on the part of several of the jurors (which I observed) to the television camera when those jurors were "on stage" and being directly questioned by one or the other of counsel. However, I do not feel that this reaction was untoward and rather was like anyone whose picture is being taken. I was generally impressed with the news media in their attempts to remain as unobtrusive as possible. I felt that the television cameras, using natural lighting, and the microphones caused absolutely no distraction during the trial itself that I was able to observe. I think particular care should be given to the taking of still photographs inasmuch as this requires the photographer to crouch or assume a position not natural to one viewing the trial and may require him to hold that position for several seconds while he adjusts his equipment to obtain a proper exposure, etc.

I appreciate this opportunity to comment on what I regard to be a very positive response by the bench-bar press committee in the area of news coverage of trials. I have long personally advocated open coverage of civil and criminal trials by photographers and/or television cameramen under a strictly controlled system to guarantee that the proceedings need not be disrupted any more than absolutely necessary. I feel that the proceedings I witnessed proved that this can be done in a responsible and unsensational manner and that the trial itself is not materially affected by such coverage.

I would like to stress, however, that I do not feel this would be the case if flash equipment or bright television lights were used which, I suppose, is obvious. However, with the techniques which make it possible to film in natural light, it is my judgment that the system is not adversely affected and the public's right to knowledge of courtroom proceedings is infinitely enhanced.

I would like to add one further comment. As your Honor knows I am chairperson of the Committees of the Young Lawyers Sections of the State and Seattle-King County Bar devoted to Law Related Education. In this regard, we encourage exposure by teachers of their students to courtroom situations, including the visiting of our superior and municipal courts by students. I think that the filming of proceedings is a step in the right direction for it enables a class to observe a trial without the necessary transportation and class disruption that the present system entails.

I would welcome the opportunity to discuss the matter further with the bench-bar press committee should the committee desire any further response.

Very truly yours,

Lawrence L. Longfelder

LLL/kc

THE BREMERTON SUN
545 FIFTH ST. BREMERTON, WASHINGTON 98310 • ES 7-3711

December 16, 1974

Paul Conrad
Allied Daily Newspapers
18601 Pacific Highway South
Seattle, WA 98188

Dear Paul:

I promised to report my observations on the Cameras-in-the-Courtroom Test and so I will, but on reflection I don't think I have many that will be very useful.

Firstly, I didn't think either the still cameras or television cameras proved to be any distraction to any of the principals in the trial. If any of the witnesses were even aware of the camera's presence, it was not obvious to me. And the jury evidently had become completely accustomed and oblivious to the photographers by the time of my attendance at the trial on its second day.

Certainly, all of the time-worn complaints that witnesses and counsel would play to the camera or would be intimidated by it or would be affected by it in some other ways were not true in this instance. I have the reservation, however, that this was not the kind of a trial in which those complaints would be likely to have much relevance.

Neither am I certain--and I suppose no one else is--that the success of this test case proves that a more typical or realistic kind of photographic coverage of trials is possible; but it certainly doesn't prove the contrary and that's probably enough success from this effort.

As an additional personal observation, I was sitting pretty near the TV camera on my first visit to the courtroom and its noise, while not very loud, made it difficult to understand some of the testimony. I suppose the use of motion cameras may require improvements in the sound amplification in the courtroom; but that's another matter.

I think the committee is to be congratulated on its work in this test and I'm looking forward to the report to be made by the committee--and to the January 10 meeting if it is possible for me to attend.

Yours truly,

Gene Gisley

30

Canon 35. Improper Publicizing of Court Proceedings.

Proceedings in court shall be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recess between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Canon 35. COLORADO.

Until further order of this court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.

PRESENT CJC 3.A.(7):

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary: Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

PROPOSED AMENDMENT TO CJC 3.A.(7)

A judge may permit broadcasting, televising, recording, and taking photographs in the courtroom during sessions of the court, including recesses between sessions, under the following conditions:

(a) Permission shall have first been expressly granted by the judge and under such conditions as the judge may prescribe;

(b) The media personnel will not distract participants or impair the dignity of the proceedings; and

(c) No witness or juror in attendance under subpoena or order of the court shall be photographed or have his or her testimony broadcast over his or her expressed objection.

# Washington trial covered by cameramen

By Hu Blonk

For the first time in the history of the State of Washington still and television cameras photographed a Superior Court trial, December 2-5.

Photography in the courtroom was allowed as a State Supreme Court-approved test sponsored by the Bench-Bar-Press Committee of Washington, to determine reactions of trial participants to the photo and television equipment operation.

The news media hopes it will lead to elimination of Canon 35 of the American Bar Association from the state's rules of court as stipulated by the high court.

The film and video tape obtained was not telecast nor the photographs published.

Witnesses were questioned by members of the bench-bar-press committee outside the courtroom after they left the stand to determine if they were affected by the news coverage. Presiding Judge Stanley C. Soderland himself questioned four after the second day's session, all interrogators using a set of questions the judge had prepared earlier.

No witness reported having been disturbed by the newsmen and equipment. Most said they hadn't noticed still pictures being taken, all said they hadn't been distracted or interferred with in giving their full attention to the trial, hadn't noticed any effect on other trial participants, hadn't been conscious of the operation of the TV equipment while waiting to testify or while testifying.

When questioned by Judge Soderland, the jurors reacted similarly they had not been distracted. Many didn't realize there was anything unusual about having cameras in the courtroom. The initial reaction of some is that it must be an important case.

Three of the four lawyers were questioned. None saw an adverse effect on the trial. One felt witnesses might have reacted differently if they had not been advised by an attorney that the TV was not live.

Judge Soderland will express his comments in writing later.

The trial involved a young driver charged with negligent homicide because he had allegedly been drinking prior to his car crashing into another, killing the driver.

It was covered by photographers of the *Seattle Times*, *Seattle Post-Intelligencer* and a weekly newspapers, and by TV cameramen from the University of Washington and Seattle Stations KING, KOMO and KIRO.

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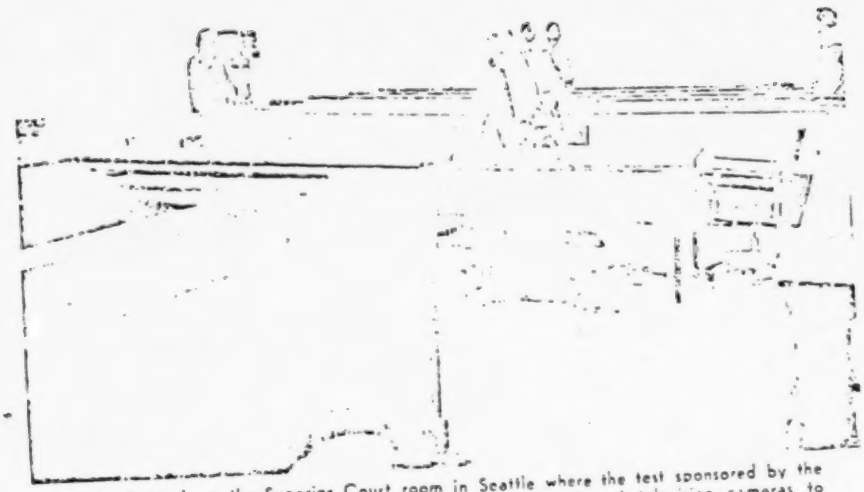
(Hu Blonk is the retired manager editor of the Wenatchee (Wash.) Daily World and is a member of the Freedom of Information Committee of the Associated Press Managing Editors Association.)



This photo shows the Superior Court room in Seattle where the test sponsored by the Bench-Bar-Press Committee of Washington permitted still and television cameras to operate. The television camera location is at left; still photos were made from the back of the room. Other locations were: jurors behind rail at right; judicial bench at left and table used by attorneys where man is placing a glass of water.

The still shots were taken with 35mm. single-reflex cameras, with lenses ranging from wide-angle to telescopic, at the rear of the old-fashioned courtroom where five rows of wooden benches are provided for 60 spectators and witnesses. The photographers moved about at a minimum, shooting some of the time from standing positions. All photography was by natural light.

The TV cameras, both film and video tape, shot footage from the second row of seats, near a wall, and about 10 feet away from the nearest attorney. Two microphones were positioned at an L-shaped table occupied by two prosecution and two defense lawyers, but far enough away so as not to pick up confidential exchanges between lawyers on each side. A third microphone was placed near Presiding Judge Stanley C. Soderland and a fourth was tied to the existing mike of the public address system at the witness stand.

Radio also participated in the test, picking up sound from the TV cameras.

The first day of the four-day trial in the 30 by 50 foot courtroom was completely recorded on video tape, requiring a bulky camera on a large tripod, and six seats in the back row for two monitors and associated equipment. The set-up was intended to resemble the arrangement required to telecast a complete trial live.

The second, third and fourth days of TV coverage involved film cameras, also on tripods. They photographed only segments of the proceedings, which film later could be inserted in regular newscasts under early and late deadlines. Shooting was limited. For instance, KING-TV filmed about 10 minutes of the 3½-hour morning session of the second day (to be edited down to 2½ minutes) and about nine minutes of the 2½-hour afternoon session (to be cut to 1½ minutes).

Still photographers averaged 25 to 30 shots per session, these including close-ups of jurors, witnesses, the defendant, the judge and others. As in the case of TV cameramen, only one photographer was used in the courtroom at a time.

A report is to be prepared on the experiment for the Bench-Bar-Press Committee of Washington, which will consider recommending to the State Supreme Court that it remove the Canon 35 courtroom photography restriction from the state's rules of court. If it does so, it will send the report to the high court, possibly along with a set of guideliness on news media conduct in the courtroom. Several members of the Supreme Court are members of the Bench-Bar-Press Committee.

Newsmen on the committee anticipate that for the high court to approve courtroom photography it must have strong support from Superior Court judges and the Washington State Bar Association, both had observors at the trial. The bar group's stand on Canon 35 is a direct quots of the ABA no-photography position.

In arranging for the test, Supreme Court Chief Justice Frank Hale had told the Bench-Bar-Press membership that he wanted "the test to meet the test of a major trial". The defendant, judge and all attorneys agreed to the experiment in advance.

Judge Soderland told the jurors at the outset of the proceedings that "the news coverage allowed has nothing to do with this lawsuit", that it was "an experiment" and that he could have "picked any lawsuit" for the purpose.

The defendant was found guilty.

Seattle Post-Intelligencer
Wed., Dec. 11, 1974 S F:9

Frank CHESLEY
Television Editor

# Courtroom TV?

A bit of journalistic history was made last week when television cameras, still cameras and a radio newsman's tape recorder were present at a King County Superior Court trial, in the case of the state vs. Thomas Dean Fetter, on a charge of negligent homicide.

Cameras and tape recorders are not at present allowed in Washington State courtrooms, but the Sate Supreme Court approved this one-time experiment for evaluation by the Bench-Bar-Press Committee and other legal, judicial and press groups.

After the four-day trial, with Presiding Judge Stanley Soderland on the bench, the jury found Fetter, 21, of Enumclaw, guilty in the July 19 highway death of Allan Swanson, 23, near Cumberland.

The controversy over the presence of cameras — still or movie — in courtrooms and legislative bodies has been long and sometimes bitter. After years of barring TV cameras from its deliberations (except for special, "public" events like the Watergate hearings), the U.S. Congress is now discussing the possibility of opening its chambers to the camera.

But Colorado is the only state which now allows still cameras and broadcasting equipment during court proceedings, with the approval of the trial judge. In 1970, public television aired a four-part series, "The City and County of Denver vs. Lauren R. Watson," the first trial ever fully televised. Colorado Supreme Court Associate Justice Frank H. Hall, writing in the American Bar Association Journal, said he found that cameras in no way have affected the dignity of the courts.

A similar change in Washington State's judicial canons has been under discussion for at least eight years, says James Murphy, executive secretary of the Washington State Association of Broadcasters. And it took nine months to find a suitable case, in which all the trial participants agreed to the presence of the cameras.

## *Visitors*

The three Seattle network affiliates and the University of Washington filmed the proceedings on successive days, still photographers from The P-I, the Times and the Federal Way News were allowed to take pictures and KOMO radio's Bryan Johnson was on hand with his tape recorder.

Observers appointed by Judge Soderland monitored the proceedings, the jurors and all participants were interviewed and the stills and electronic journalism reports will be collected for study by the Bench-Bar-Press Committee. Paul Conrad, executive secretary of the Allied Daily Newspapers of Washington, is in charge of the experiment subcommittee.

Initial reaction to the test has been highly favorable. Judge Soderland, one of the most respected members of the beach wouldn't offer an opinion on cameras in the courtroom, but said, "There's a preconceived notion that it's inappropriate . . . I do favor considering a change."

He said "They picked a good trial and it went very well, very smoothly . . . Instead of a one-sided case, the witnesses were

(Continued)

—P-I Photo by Phil H. Webber

TV CAMERAMAN PAUL LITZ FOCUSED ON NEGLIGENT-HOMICIDE TRIAL

It was part of an experiment in superior court here

conflicting and the expert witnesses disagreed."

Defense attorney Byron Ward believes the presence of television cameras would have an effect on public attitudes. He said, "The fictional lawyers on television — Hawkins, Petrocelli — are a total distortion. If they acted that way in a real courtroom, they'd be thrown out."

And Murphy said, "Perry Mason isn't even close."

The other defense attorney, Charles Bergeson, said the camera's presence "would be better for the law. Lawyers would be better prepared."

KOMO news director Howard Scott also believes the test went well. "I was surprised at the lack of attention paid the camera. The disruptive factor is

witnesses were not ill-[illegible] dated and didn't play to the camera."

## *Need for Change*

Murphy is the most vocal about the need for a change. "A courtroom is the last place a cam[illegible] cannot go," he [illegible] "Cameras can go to the moon, and do. They can go 10,000 feet under the sea, and do. But they can't go into the courts."

Both print and electronic journalists, of course, would like the judicial canons amended to allow cameras in courtrooms. But, as Murphy said, "There's a lot of emotion wrapped up in the judiciary and the bar, not much of it pro cameras. I'd say 90 per cent of the bar would be against it."

That opposition plus the resolution of several still unanswered questions, assures that the camera's presence in Washington State courtrooms is hardly imminent.

Are the clicking shutter and whirring movie camera gears any more distracting than then norm

shuffling and noise in courtroom? What should the ground rules [illegible] pool cameras, po[illegible]m and other guidelines.

And a perhaps unswerable question: W effects would a one-minute-30 second event news distillation of day's trial events h say, on an unsequest jury?

A negligent homi case is not the sor case that normally w attract extensive cover

And the Fetter ca self? It is something commentary on a soci that traffic fatalities worth, at best, a filler of paragraphs Fetter case, becau the negligent homi charge, got four graphs.

(Proposed)

GROUND RULES FOR PRESS PHOTOGRAPHERS IN COURTROOMS

1. The judge has absolute authority to direct whether photographs may be taken within the courtroom. The photographer should advise the bailiff, prior to the start of a court session, that he desires to take photographs. The bailiff may have prior instructions from the judge as to where the photographer may position himself. In the absence of any directions from the judge or bailiff, the photographer should remain behind the front row of spectator seats.

2. Unless the judge directs otherwise, no more than one still picture photographer is to be taking pictures in the courtroom at any one time. It is the responsibility of each photographer present at the opening of each session of court to achieve an understanding with all other photographers present as to which will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding must be reached outside the courtroom and without imposing on the judge or court personnel.

3. The photographer's dress and equipment should not set him apart unduly from other trial spectators. Camera which operate without flash and with a minimum of noise should be utilized.

4. The photographer's movements in and out of the courtroom and while taking pictures should be unobtrusive. He should not, for example, assume body positions inappropriate for spectators.

# ILLUSTRATIVE BROADCAST GUIDELINES

The following are submitted as illustrative of the type of voluntary constraints under which broadcast news journalists would operate. They are not submitted as being in final or for approval. With rapidly changing technology, etc, it is felt the best procedure is that followed by Judge Soderland in the test case, which was to leave the matter of placement, type of equipment, etc, up to the professional judgment of the broadcast journalists in attendance.

1. Officers of court. The judge has the authority to direct whether broadcast equipment may be taken within the courtroom. The broadcast news person should advise the bailiff prior to the start of a court session that he or she desires to electronically record and/or broadcast live from within the courtroom. The bailiff may have prior instructions from the judge as to where the broadcast reporter and/or camera operator may position themselves. In the absence of any directions from the judge or bailiff, the position should be behind the front row of spectator seats by the least used aisleway or other unobtrusive but viable location.

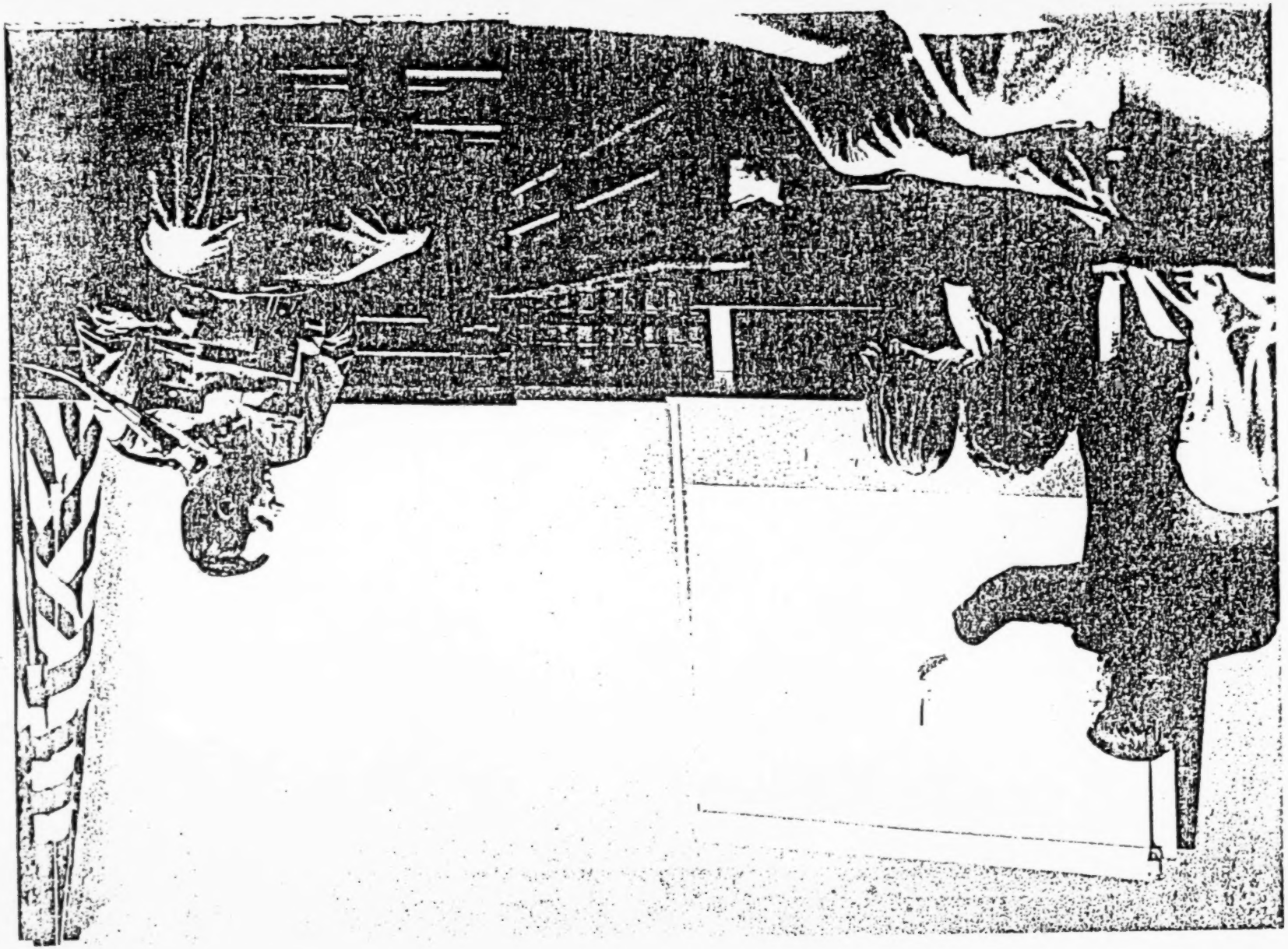
2. Pooling. Unless the judge directs otherwise, no more than one TV camera should be taking pictures in the courtroom (as presently constructed) at any one time. Where coverage is by both radio and TV the microphones used by TV should also serve for radio and radio should be permitted to feed from the TV sound system. Multiple radio feeds, if any, should be provided by a junction box outside of the courtroom such as in the adjacent public hallway. It should be the responsibility of each broadcast news representative present at the opening of each session of court to achieve an understanding with all other broadcast representatives as to who will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding should be reached outside the courtroom and without imposing on the judge or court personnel.

   Broadcast coverage outside the courtroom should be handled with care and discretion, but need not be pooled.

3. Broadcast equipment. All running wires used should be securely taped to the floor. All broadcast equipment should be handled as inconspicuously and quietly as reasonably possible. Sufficient film and/or tape capacities should be

provided to obviate film and/or tape changes except during court recess. No camera should give any indication of whether it is or is not operating such as the red light on some studio cameras. No additional lights should be used without the specific approval of the presiding judge and then only as he may specifically approve as may be needed in the case of appellate hearings.

4. Decorum. Broadcast representatives' dress should not set them apart unduly from other trial spectators. Camera operators should not move tripod-mounted cameras except during court recesses. All broadcast equipment should be in place and ready to function no less than 5 minutes before the beginning of each session of court.



Judge Guy E. Humphries, Jr.,
Report on Pilot Project on
The Presence of Cameras
and Electronic Equipment
in the Courtroom

NINTH JUDICIAL DISTRICT COURT

PARISH OF RAPIDES

STATE OF LOUISIANA

TO: The Chief Justice and Associate Justices of the Louisiana Supreme Court

FROM: Guy E. Humphries, Jr., District Judge, Division B, Ninth Judicial District Court

REPORT ON PILOT PROJECT ON THE PRESENCE OF CAMERAS AND ELECTRONIC EQUIPMENT IN THE COURTROOM

This is a report pursuant to Pargaraph 11 "Duration and Evaluation" of the Order of the Louisiana Supreme Court of February 23, 1978.

Subsequent to the order, Judge Humphries attempted to obtain permission for camera and electronic coverage of every proceeding of every case that came up in his court.

Judge Humphries met with very limited success in obtaining permission for camera and electronic coverage.

The first matter wherein permission was obtained was State of Louisiana v. Henry H. Reid, Sheriff of Calcasieu Parish. Judge Humphries was assigned by the Louisiana Supreme Court to sit on the aforesaid trial. During the course of the trial the jury was taken out to where the Sheriff lived to view the property that he owned that was commonly referred to during the course of the trial as the "Sheriff's farm". The cameras accompanied the court personnel, the jury and a number of spectators to the property. Quite a bit of TV filming and still pictures were made

at the "farm". The TV station had a special showing of approximately 5 minutes of the film it had made. In addition to this permission was obtained from the parties and the attorneys for live TV and radio coverage and still photography of the rendition of the verdict by the jury. The cameras filmed the jury returning to the courtroom, after it had reached a verdict, and the colloquy between the judge and the jury pertaining to the finding of a verdict and the passage of the verdict sheet to the judge and then to the clerk and the reading of the verdict. As soon as this was done the film was rushed to the TV station and put on the air. The television station had previously informed its listeners that the verdict was to be recorded by the TV camera and any program underway would be interrupted for the showing of the rendition of the verdict.

After the jury had rendered its verdict the Court asked the jurors if they were in anywise affected by the camera or the fact that they knew before their deliberation, that they were going to render their verdict on TV camera and they all replied in the negative. Each juror was polled and stated that they had no feeling one way or the other about the cameras and electronic equipment. The attorneys were asked if they felt any distraction or disruption or were anyway affected by the presence of the camera and the electronic equipment and they all replied in the negative. The Judge had no feeling one way or the other about the presence of the cameras and the electronic equipment. Once the court came back into session, after its recess during the jury deliberation, the presence of the camera just slipped one's mind. There was no more awareness of the TV camera than there was of people in the courtroom.

This experiment indicated to the writer that many, many of the fears expressed in the past about the presence of cameras and electronic equipment in the courtroom were totally unfounded. This will be developed further in the report.

The only other success in obtaining camera and electronic coverage took place in Rapides Parish in the criminal trial of State v. James Williams. There was present in the courtroom one TV camera, a news photographer with a still camera, a news reporter with a small cassette tape recorder and microphones from the radio station. The cameras and operators and newsmen were spotted in the courtroom at the direction of the trial judge and there they remained until the trial was over.

There was a little more coverage in this trial than there was in the Reid trial. There was coverage of the closing arguments of the district attorney and defense counsel and the charge to the jury on the law by the judge, and the rendition of the verdict by the jury.

All of the equipment used was in accordance with the guidelines laid down by the Louisiana Supreme Court. The TV camera was out on the opposite side of the bar in one of the side aisles and was not moved ever.

The experiment went quite well, there was no interruption or distractions. The people coming in and out of the courtroom were much more noticable than the cameras and newsmen. The radio station carried the entire matter live from the courtroom. Surprisingly enough the majority of the comments were from radio listeners. People were not even aware that it was going to come on but when it did they were aware that it was a court proceeding and many just stayed by the radio to listen, even though it was approximately two hours. This matter was carried by the radio station live to the radio audience without any

interruptions, except for the station identification required by FCC.

The jury was aware that the filming would be done. After the finding of the verdict the jurors were polled as to their reaction to the camera and they all stated that they had no reactions to it. They stated they were not affected one way or the other by the presence of the TV camera. They were specifically asked if they thought that the fact that this matter was being covered by the television placed any greater importance on the case than they would ordinarily have and they all stated in the negative.

The judge had a discussion with the attorneys and the assistant district attorneys and the defense attorneys all stated that they were not at all affected by the cameras.

The charge to the jury was somewhat lengthy in that it was the serious crime of armed robbery. The Court was not aware of the presence of the cameras or the radio microphones during the time of the charge to the jury. Movement of spectators in and out of the courtroom is far more noticeable, subconsciously than was the presence of the TV camera and its operator. One has a subconscious awareness of the cameras in the courtroom equal to one's awareness of the people in the courtroom.

## EVALUATION

It is the writer's opinion that this limited pilot project was very successful. The writer is of the opinion that cameras should be permitted in the courtroom at the discretion of the trial judge.

The Court determined that the many fears that are expressed about the presence of the TV camera are unfounded.

There was no loss of dignity or decorum in the courtroom whatever.

Neither the attorneys nor the judge tended to act or "ham it up" because of the presence of the cameras.

The cameras were not distracting in anyway. The lawyers argued to the jury and did not argue to the camera. The Court in giving the charge to the jury addressed the jury and not the camera.

The television is a part of the modern way of life. The writer sees the entrance of television cameras into the courtroom for the benefit of the viewing public as well as for the benefit of the court.

In both instances the parts of the trial that were broadcast were very objective. I feel that the news media can be more objective about reporting court proceedings if permitted to use cameras and electronic equipment.

We are presently using audio/vidio depositions in court. Most courts are going to electronic recording equipment in lieu of court reporters using shorthand or stenotype. At times photographs are made of a chalk board that is being used in the courtroom in order that the appellate court would have the benefit of drawings and diagrams put on chalk boards by witnesses.

This writer recommends another pilot project similar to the one that was authorized on February 23, 1978 with certain changes. The writer would like to have permission to conduct this pilot project again but without the requirement of obtaining the consent

of the attorneys or the parties or the victim. This writer also recommends that Paragraph 8 of the order be amended so that the film, vidio tape and still photographs or audio reproductions could be used for any purpose. If the Court is not willing to grant permission for a pilot project solely at the discretion of the trial judge, but is of the opinion that consent should continue to be obtained, the writer would still like permission to continue the pilot project.

It is felt that there was not sufficient coverage to do a full evaluation that the writer would like to do.

This writer is of the opinion that TV cameras can be placed in the courtrooms on wall mounts and that very few people would be aware of their presence. There are presently two courtrooms in the Rapides Parish Courthouse that have two surveillance cameras that are functioning at all times. These surveillance cameras are monitored in the Sheriff's Office as well as in the office of the jailer.

The writer does request permission to continue this pilot project as above recommended or under such other restrictions as the Court may impose.

Respectfully submitted,

Guy E. Humphries, Jr.

GUY E. HUMPHRIES, JR.
Judge, Division B
Ninth Judicial District Court

Media Advisory Committee,
Interim Report to the
Chief Judge of the New
York State Court of
Appeals, May 30, 1980

# INTERIM REPORT

to the

CHIEF JUDGE

of the

NEW YORK STATE COURT OF APPEALS

by the

MEDIA ADVISORY COMMITTEE

May 30, 1980

On October 16, 1979, the New York State Court of Appeals, for the first time, invited television and press photographers into its courtroom in order to present to the public an actual court session.

Partly as a result of the uniformly favorable response to this experiment, on December 6, 1979, Chief Judge Lawrence H. Cooke appointed the Media Advisory Committee to study the issue and make recommendations to him, and then to the Court of Appeals and to the Chief Administrative Judge, with respect to proposed amendments to the Rules of Judicial Conduct governing broadcasting or telecasting from a courtroom.

Paragraph seven of subdivision (a) of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (22 NYCRR 33.3(a)(7)) now provides as follows:

> (7)(i) The taking of photographs in or of a courtroom, the broadcasting from a courtroom and the telecasting in or of a courtroom any time or on any occasion, whether or not the court is in session is forbidden, unless permission of the chief judge of the Court of Appeals is first obtained. However, this provision shall not apply to applications made to the appropriate court for photographing, taping, or videotaping by or on behalf of the parties to the litigation for the sole purpose of the litigation and not for public dissemination.
>
> (ii) In criminal matters, law enforcement and court personnel should not prevent the photographing of defendants when they are in public places outside the courtroom. They should neither encourage nor discourage pictures or televising but they should not pose the accused.
>
> (iii) The foregoing is not to be construed as a limitation upon the responsibility and authority of the chief judge of the Court of Appeals, the

> presiding justices of the Appellate Divisions or the administrative judges to formulate and effectuate such reasonable rules as may be necessary and proper to ensure that the coverage permitted shall respect the dignity, decorum and safety of the courthouse and the proper conduct of court business therein.

The Media Advisory Committee was appointed to ascertain whether the absolute prohibition of broadcasting contained in this rule should be continued, and, if not, to develop guidelines for authorized radio and television broadcasting and television and still news photography.

The initial meeting of the Committee was held on December 19, 1979, to organize the Committee and to decide upon the best method of accomplishing its task. At this meeting the Committee viewed video cassette excerpts of the October 16, Court of Appeals experiment and conducted a general discussion of the concept of media coverage of court proceedings.

The Committee decided to solicit the views of all interested groups and individuals concerning media access to courtrooms. Pursuant to this approach the Committee wrote to many groups and individuals and distributed a release requesting all interested persons and groups to submit written comments, personal, professional and technical, assessing the issue of access by the electronic and print/photographic media to the courts. The release stated that the Committee was particularly interested in opinions and expressions of view relating to:

(a) coverage of civil and criminal matters;
(b) attitudes of litigants, witnesses, lawyers, jurors, judges, prosecutors, media representatives, educators and the like;

(c) rules of procedure for governing access, should it be approved;
(d) commercial and educational differences, if any, in the use of the ultimate product of access;
(e) consent or notice safeguards, if any, and in what form;
(f) uniformity and application of technical specifications to existing conditions;
(g) pool coverage;
(h) cost factors and who shall bear the fiscal burden;
(i) any other aspect or perspective which would be helpful to a thorough consideration of the main issue of access at all and implementation if authorized.

The response to this release was voluminous and illuminating, demonstrating the wide and varied interest in and importance of this issue. The Committee received letters and memorandums from law school and college professors, bar associations, judges, court administrators, judicial associations, media representatives, lawyers, public officials of all kinds, various public interest groups, State and local agencies and private individuals. These materials reflected a wide variety of views, pro and con, with respect to the central issue of permitting media access, and provided excellent, valuable, technical and legal assistance concerning proposed guidelines.

The Committee also wrote to the administrative offices of the courts of all states which now permit television coverage or are experimenting with this coverage, requesting any reports, studies or evaluations which those states may have compiled. In response to this request the Committee received volumes of material from twenty-two states indicating their experience with media access to the courtroom.

After studying the materials received in response to its requests for information, the Committee met again on May 6, 1980, to discuss and adopt its position and formulate recommendations.

As a result of those deliberations the Media Advisory Committee recommends that the Rules of Judicial Conduct be amended: (1) to permit the broadcasting of appellate proceedings on a permanent basis, and (2) to authorize an experimental program giving judges discretion to allow audio-visual coverage of Civil Trials on a controlled basis in diverse locations in New York State, including urban, suburban and rural communities. Both changes should be subject to authorizations from the Chief Judge, or the Court of Appeals or whomsoever they shall delegate to insure control, centralization and consistency.

Since a successful experiment with respect to televising appellate proceedings has already been completed and evaluated, we believe that the Court of Appeals should now issue permanent rules governing appellate proceedings. Our study of the successful Court of Appeals experiment and the response thereto forms the basis of our recommendation to promulgate the following rules substantially adopted from the proposal submitted to us by the Association of the Bar of the City of New York, Special Committee on Communications Law, to whom we are very grateful for an excellent overall work product.

I.

## GUIDELINES FOR ELECTRONIC AND PHOTOGRAPHIC RECORDING OF APPELLATE COURT PROCEEDINGS

1. Equipment and personnel.

(a) Two portable videotape electronic television cameras and two camera operators shall be permitted in any proceeding in any appellate court.

(b) Two still photographers and two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in any appellate court.

(c) One audio system for radio broadcast purposes shall be permitted in any proceeding in any appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judge or justice of the court hearing the appeal.

(d) Notwithstanding the provisions of (a), (b) and (c), above, the court may increase or decrease the amount of equipment that will be permitted into the courtroom on finding (1) that there is a need therefor because of special circumstances, and (2) that it will not impair the dignity of the court or the judicial process.

(e) Notwithstanding the provisions of (a), (b) and (c), above, the equipment authorized therein shall not be admitted into the courtroom unless interested members of the electronic media and interested print photographers shall have entered into pooling arrangements, for their respective groups, including the establishment of necessary procedures, cost sharing, access to material, and selection of a pool representative. The court may not be called upon to mediate any dispute as to such arrangements. In making pool arrangements, consideration shall be given to educational users' needs for full coverage of entire proceedings.

2. Sound and light criteria.

(a) Only television photographic and audio equipment and still camera equipment which do not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, television photographic and audio equipment shall produce no greater sound or light than the equipment designated in Appendix A annexed hereto; and still camera equipment shall produce no greater sound or light than a 33 mm. Leica "M" Series Rangefinder Camera.

(b) It shall be the affirmative duty of media personnel desiring to use equipment other than that authorized in these Rules or the appendix thereto to demonstrate to the Court adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment and personnel.

Television and still camera equipment and camera personnel shall be positioned in such locations as shall be designated by the court. The areas designated shall provide reasonable access to coverage with the least possible intrusion into court proceedings. Videotape recording equipment which is not a component part of a television camera shall be located in an area outside the court facility.

4. Movement of equipment during proceedings.

Electronic, still photographic and audio equipment shall not be placed in or removed from the court facility and related personnel shall not move about the courtroom except prior to commencement or after adjournment of proceedings each day, or during a recess. Whenever possible television film magazines and still camera film or lenses shall be changed during a recess in the proceeding.

5. Courtroom light sources.

With the concurrence of the court, modifications and additions may be made in light sources existing in the facility, provided such modification or additions are installed and maintained at media expense.

6. Conferences of counsel.

To protect the attorney-client privilege and effective right to counsel, there shall be no audio pickup or audio broadcast of conferences which occur in a court house or

facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench. Nor shall any chambers conference be filmed, recorded or broadcast.

7. Consent not required.

Electronic media or print photography coverage of appellate arguments shall not be limited by the objection of counsel or parties, except for good cause shown.

8. Appellate review.

An order including or excluding the electronic media from access to any proceeding, or upon any other matters arising under these standards shall not be appealable.

* * * * * * * * * * * * *

No experimentation with respect to media coverage of trial court proceedings has ever been conducted in New York, and, therefore, a controlled trial period of authorization is essential to evaluate effectively the impact of television upon all parties to litigation and upon the judicial trial process in this State.

The advantages of allowing the public to observe the proceedings in our trial courts outweigh the disadvantages articulated by those who oppose all access by the media. While the Committee recognizes and respects the existence of divergent views on this subject, it nevertheless concludes that the

issuance of authorization to proceed on an experimental basis is the most prudent and wisest course of action.

As indicated in the report of Association of the Bar's Special Committee on Communications:

> An experimental pilot program for televising trial court proceedings is the logical next step for New York State. The same reasons that justified television coverage of appellate arguments should lead to trial court coverage as well: (1) it will educate the public on how trial courts perform and how the rule of law operates at the trial level; and (2) it will serve to produce important educational materials for lawyers and law students.

Although the Committee recommends the implementation of an experimental program, it recognized and the entire Media Advisory Committee believes that an amendment to section 52 of the Civil Rights Law is necessary. Many believe it is necessary before any project at the trial level may proceed. Section 52 provides in pertinent part:

> No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of a proceeding, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in the state. ...

A recent Attorney General's Opinion has interpreted this section as an absolute prohibition which cannot be waived by the parties to a proceeding. 1978 Op. Atty. Gen. 68 (August 15, 1978).

Some members of the Committee noted that this section may be subject to less absolutist interpretation and construction. Some also opine that the legislative enactment may even be in

conflict with the Court of Appeals' authority to approve standards and administrative policies with respect to the judicial branch, pursuant to section 28 of article six of the New York State Constitution. Thus, the Committee must leave to the Court's final interpretation and decision whether to proceed without a statutory amendment, if, in any event, the Court accepts our basic recommendations. It is the majority position of the Committee, however, that an appropriate amendment should be sought in all events even if an experiment is commenced without the statutory change. In this regard the Committee offers to draft proposed legislation if the Court agrees that this is necessary; for example "court" could be repealed and excised from the section.

We also recommend that the trial court experiment be limited to trials of civil actions at this time. The United States Supreme Court has recently granted a petition for certiorari and agreed to review a determination of the Florida Supreme Court upholding the constitutionality of televised coverage of criminal proceedings. Chandler v. Florida, ___U.S. ___, cert. granted, April 21, 1980. In Chandler, the Supreme Court will review the question whether media coverage of criminal trials violates rights to a fair trial and to due process under the Sixth and Fourteenth Amendments to the United States Constitution. 27 Cr. L. Rptr. 4029. Since an effective experiment must be based upon experience with actual trials, the coverage of criminal trials in New York now imparts too great a risk of possible irreparable error. To avoid this

risk, criminal trials should be excluded from the experiment until the Supreme Court has decided the case and issued its ruling and articulation.

Although the Committee was closely divided concerning whether the consent of the parties should be required, the majority agreed to forego this requirement prior to authorizing media coverage of civil trials during the experiment, at least. Experience in other states has shown that to require consent would practically eliminate the opportunity to conduct the experiment and would unduly restrict the discretion of the trial judge in this regard. Furthermore, since consent is not required for the print media, we do not think it is necessary, desirable or evenhanded for other media to be so encumbered.

The Rules of Judicial Conduct, when and if amended to permit media access to Civil Trials on a controlled experimental basis, should also provide that the discretion of the trial judge presiding shall control and that the experiment be conducted in diverse locations in New York State specifically designated for this purpose by the Chief Administrative Judge, including urban, suburban and rural communities. Overall, the experiment should be subject to authorization of the Chief Judge or the Court of Appeals or whomever they shall delegate to insure control, centralization and consistency. This experiment should be conducted in accordance with the following guidelines which were also based substantially upon those submitted by the

Association of the Bar's Special Committee on Communications with respect to whom we have already expressed our appreciation.

## II.

## GUIDELINES FOR ELECTRONIC AND PHOTOGRAPHIC RECORDING OF CIVIL TRIAL COURT PROCEEDINGS FOR EXPERIMENTAL PERIOD

1. Equipment and personnel.

(a) Two portable videotape electronic television cameras and two camera operators shall be permitted in any proceeding in any trial court.

(b) Two still photographers and two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in any trial court.

(c) One audio system for radio broadcast purposes shall be permitted in any proceeding in any trial court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the Administrative Judge of the district in which the trial court is located.

(d) Notwithstanding the provisions of (a), (b) and (c), above, the court may increase or decrease the amount of equipment that will be permitted into the courtroom on finding (1) that there is a need therefor because of special circumstances, and (2) that it will not impair the dignity of the court or the judicial process.

(e) Notwithstanding the provisions of (a), (b) and (c), above, the equipment authorized therein shall not be admitted into the courtroom unless interested members of the electronic media and interested print photographers shall have entered into pooling arrangements, for their respective groups, including the establishment of necessary procedures, cost sharing, access to material, and selection of a pool representative. The court may not be called upon to mediate any dispute as to such arrangements. In making pool arrangements, consideration shall be given to educational users' needs for full coverage of entire proceedings.

(f) The pool operator covering the proceedings shall retain pool material for one year. The pool operator shall make available a copy of pool material at cost to educational users or to the Court of Appeals at their request.

2. Sound and light criteria.

(a) Only television photographic and audio equipment and still camera equipment which do not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, television photographic and audio equipment shall produce no greater sound or light than the equipment designated

in Appendix A annexed hereto; and still camera equipment shall produce no greater sound or light than a 35 mm. Leica "M" Series Rangefinder Camera.

(b) It shall be the affirmative duty of media personnel desiring to use equipment other than that authorized in these Rules or the appendix thereto to demonstrate to the Court adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment and personnel.

Television and still camera equipment and camera personnel shall be positioned in such locations as shall be designated by the court. The areas designated shall provide reasonable access to coverage with the least possible intrusion into court proceedings. Videotape recording equipment which is not a component part of a television camera shall be located in an area outside the court facility.

4. Movement of equipment during proceedings.

Electronic, still photographic and audio equipment shall not be placed in or removed from the court facility and related personnel shall not move about the courtroom except prior to commencement or after adjournment of proceedings each day, or during a recess. Whenever possible television film magazines and still camera film or lenses shall be changed during a recess in the proceeding.

5. Courtroom light sources.

With the concurrence of the court, modifications and additions may be made in light sources existing in the facility, provided such modification or additions are installed and maintained at media expense.

6. Conferences of counsel.

There shall be no audio pickup or audio broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench, without the express consent of all participants in the conference. Nor shall any chambers conference be filmed, recorded or broadcast.

7. Voir dire or pretrial hearings.

During the conduct of any voir dire or pretrial hearing at which the print media is ordered by the trial judge to be excluded, the electronic media shall also be excluded.

8. Reports.

For the purpose of further evaluation by the Court of Appeals, in any case in a trial court where coverage of any kind shall be afforded to the news media as authorized herein, immediately upon the conclusion of such case a report shall be filed with the Court of Appeals on the effect of such coverage by the trial judge, by each trial counsel who has been of record in the case and by the media representatives, if they so wish. Such reports shall state the general reaction of such participant to the media coverage, together with a state-

ment of such participant as to any changes in guidelines that might be suggested. The foreman of the jury shall also be asked his reaction by the trial judge, who shall make any response a part of his report. The reports shall be filed with the Clerk of the Court of Appeals on forms prepared by the Chief Administrative Judge of the Courts.

9. Location and coverage of trial courts during experimental period; selection of trials for coverage; appeals.

(a) The Chief Administrative Judge shall designate the county or counties where media coverage shall occur as authorized by these guidelines. The television, radio or print photography media may petition the judge presiding at the trial or special term in the designated county or counties for permission to cover specific civil trials in which they are interested, upon reasonable notice to the Administrative Judge. Permission for coverage shall be in the sole discretion of the judge presiding. An order including or excluding the electronic media from access to any proceeding shall not be reviewable upon appeal or in a collateral proceeding.

(b) In deciding which trials shall be televised, broadcast, and/or photographed, the judge presiding shall take into account the following factors: the type of case involved; whether such coverage would cause a substantial increase in the threat of harm to any participant in the case or would otherwise interfere with the fair administration of justice or materially interfere with the advancement of a fair trial or the rights of the parties.

10. Broadcasting by the media.

During the trial period authorized herein, there will be no restrictions on the broadcasting of public civil proceedings, including live broadcasts of same, except such restrictions as may otherwise exist in express provisions of law, as for example Family Court Act proceedings and the like.

11. Mandatory pretrial conference.

(a) Because of the novelty of a pilot program and the inexperience both of the judiciary and the media, a mandatory pretrial conference in each selected case shall be held among the judge presiding, attorneys and media personnel assigned to cover the proceedings, with all matters discussed to be consistent with the guidelines herein adopted. Objections, if any, to electronic or print photography media coverage shall be considered at this conference.

(b) At such conference the judge presiding shall review with all present the guidelines herein adopted and shall make such rulings as to the judge or justice may seem most appropriate.

12. Consent not required.

Electronic media or print photography coverage of civil actions during the experimental period shall not be limited by the objection of counsel, parties or witnesses, except for good cause shown.

13. Impermissible use of media material.

None of the film, videotape, still photographs or audio

reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

14. Duration of trial period.

The trial period shall run for one year or until at least twenty trial-court cases have been covered by television and print photography unless terminated or extended prior thereto by order of the Court of Appeals.

* * * * * * * * * * *

The Committee offers its availability to the Chief Judge and the Court of Appeals for continued service, monitoring and evaluation of reports of the participants in the experiment, should the Court approve it, and to make recommendations with respect to the desirability and content of permanent rules.

We express our gratitude to all who have helped us and especially to the Chief Judge and the Court of Appeals for their completed experiment and their continued leadership, and for this opportunity to participate in this project.

Respectfully submitted,

THE MEDIA ADVISORY COMMITTEE

A. Franklin Mahoney, Chairman
Sidney H. Asch
Joseph W. Bellacosa
Eve Bunting
Charles S. Desmond
Ellen Fleysher
William E. Hellerstein
Andrea Hyde
Louis J. Lefkowitz
Anthony R. Palermo
William S. Stevens
Edwin Torres

John J. Poklemba,
Counsel

# APPENDIX A

## VIDEO TAPE ELECTRONIC CAMERAS

| | | |
|---|---|---|
| 1. | Ikegami | HL-77, HL-33, HL-35, HL-34, HL-51 |
| 2. | RCA | TK-76 |
| 3. | Sony | DXC-1600 Trinicon |
| 3a. | ASACA | ACC-2006 |
| 4. | Hitachi | SK-80, SK-90 |
| 5. | Hitachi | FP-3030 |
| 6. | Philips | LDK-25 |
| 7. | Sony BVP-200 | ENG Camera |
| 8. | Fernseh | Video Camera |
| 9. | JVC-8800 u | ENG Camera |
| 10. | AKAI | CVC-150, VTS-150 |
| 11. | Panasonic | WV-3085, NV-3085 |
| 12. | JVC | GC-4800 u |

## VIDEO TAPE RECORDERS/used with video cameras

| | | |
|---|---|---|
| 1. | Ikegami | 3800 |
| 2. | Sony | 3800 |
| 3. | Sony | BVU-100 |
| 4. | Ampex | Video Recorder |
| 5. | Panasonic | 1 inch Video Recorder |
| 6. | JVC | 4400 |
| 7. | Sony | 3800H |

Supreme Court, U.S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

CASE NO. 79-1260

NOEL CHANDLER AND ROBERT GRANGER,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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# RESPONDENT'S MOTION TO DISMISS OR AFFIRM

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Attorneys for Petitioner

COMES NOW, the Respondent, THE STATE OF FLORIDA, by and through its undersigned counsel, pursuant to Sup.Ct. R.16 (28 U.S.C.), and moves this Honorable Court to dismiss the Petition for a Writ of Certiorari, and as grounds therefore shows:

1. That the Respondent is in receipt of the Petitioner's Petition for a Writ of Certiorari, which is improperly designated, "Jurisdictional Statement." The Petitioners now make a bare allegation that Canon 3(A)(7) of the Code of Judicial Conduct promulgated by the Florida Supreme Court, has denied them a fair and impartial trial and due process of law.

2. That said Petition is predicated upon the unreported decision which is appended hereto, of the Supreme Court of Florida, in Chandler v. State, S.Ct.

Case No.s 56,040, 56,194 and 56,236, opinion filed September 27, 1979, and the Florida District Court of Appeal, Third District, opinion in Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979). The remaining decision cited by the Petitioners at State v. Granger, 352 So.2d 175 (Fla. 1977), is a table citation.

3. That the Supreme Court of Florida's opinion herein states simply that the court is without jurisdiction, to wit:

> "PER CURIAM
>
> This cause reaches us by way of petitioners' assertion of appellate jurisdiction and petition for writ of certiorari from a decision of the District Court of Appeal, Third District, reported at 366 So.2d 64. We have no appellate jurisdiction, as the district court expressly declined to rule upon

the constitutional issue. Chandler v. State, 366 So.2d 64, 69 (Fla. 3d DCA 1978).

Nor do we have certiorari jurisdiction. No conflict has been demonstrated, and the question of great public interest certified to us by the district court has been rendered moot by the decision in Petition of Post-Newsweek stations, Florida, Inc., [370 So.2d 764 (Fla. 1979)]. Accordingly, the petition for writ of certiorari is denied."

The Respondent concedes that the Supreme Court of Florida has determined that cameras in the courtroom are not unconstitutional per se. See, Estes v. Texas, 381 U.S. 532 (1965). The District Court's opinion had certified the question of the constitutionality of Florida Judicial Canon 3(A)(7), thus:

> "In determining that a one year trial program should be instituted, the Florida Supreme Court has

> determined that camera coverage of a trial does not, in and of itself, violate the federal and state constitutions. Petition of Post-Newsweek Stations, Florida Inc., 377 So.2d 1 (Fla.1976), 337 So.2d 804 (Fla.1976), 347 So.2d 402 (Fla.1977), 347 So.2d 404 (Fla.1977). We, therefore, decline to discuss further the constitutionality per se of the canon, although we will, in view of the importance of the question involved, certify the decision to the Supreme Court of Florida as a question of great public interest."
>
> 366 So.2d at 69.

However, relevant to this Court's jurisdiction, the Florida District Court also held that:

> "We pass on to that portion of the defendant's point which urges that matters occurring in their trial pursuant to the experimental cannon

deprived them of their right to a fair trial and was violative of due process of law. The defendants urge error with regard to two rulings allowing television cameras in the courtroom during their trial; error is urged (1) in declining to preclude television cameras from their trial and (2) in declining to sequester the jury. However, the defendants have not met their burden of showing from this record that either of these circumstances operated to deprive them of a fair trial.

"We have examined the record in the light of the defendants' contentions under this point and find no reason on this record to hold that the admission of television cameras into this particular trial caused the defendants any difficulty in the preparation or presentation of their case or deprived them of a impartial jury. Accordingly, we hold that no error is shown by the defendants' first point." [Emphasis added].

366 So.2d at 69.

The decision of the Florida Supreme Court and the Florida District Court of Appeal fail to manifest the requisite grounds to invoke this Court's jurisdiction.

4. That it is patently obvious upon the relevant portion of the District Court's opinion above that, 1) there is no federal question properly preserved for review in the Petitioners' trial regarding Florida Judicial Canon 3(A)(7) and 2) that where the issue on the face of the record was not properly preserved, then the Supreme Court of Florida's finding merely that it is without jurisdiction, based upon the Florida Rules of Appellate Procedure, does not present a substantial federal question. See, Fla.R.App.P. 9.030(a). Moreover, while certifying the question regarding Petition

of Post-Nesweek, the Florida District Court affirmed the Petitioners' convictions upon separate state grounds, not questioned in the instant petition.

5. That Sup.Ct. Rule 16 (28 U.S.C.) at 1(b) and (c), provides specifically that:

> "(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis.
>
> "(c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so un-

> substantial as not to need further argument."

It is wholly apparent, upon the face of the record, that the convictions herein rest upon non-federal grounds; that the Petitioners have failed to properly preserve the federal question of which they complain and that the question of state law regarding the Florida Supreme Court's certiorari jurisdiction, which was passed upon by the Florida Supreme Court in the decision that the Petitioners seek to have reviewed, is manifestly not a substantial federal question. The cause herein should therefore be dismissed and/or the judgment below should be affirmed, inasmuch as the question presented by the Petitioners is "so unsubstantial as to not need further argument." Durley v. Mayo,

351 U.S. 2, 76 S.Ct. 806, 100 L.Ed. 1178 (1956); Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955); Lynch v. New York, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934).

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order dismissing the judgment below.

RESPECTFULLY SUBMITTED, on this ____ day of March, 1980, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128
Phone: (305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Motion to Dismiss or Affirm were caused to be served by United States mail first-class delivery on the ___ day of March, 1980, upon Joel Hirschhorn, Attorney for the Petitioner, 742 N.W. 12th Avenue, Miami, Florida, 33136 and upon Talbort D'Alemberte, Steel, Hector and Davis, Attorneys for Amicus Curiae, 1400 Southeast First National Bank Building, Miami, Florida, 33131.

CALVIN L. FOX, Esquire
Assistant Attorney General

RESPONDENT'S EXHIBITS

# Supreme Court of Florida

RECEIVED
ATTORNEY GENERAL
MIAMI OFFICE
DOCKETED

Nos. 56,040
56,194
56,236

NOEL CHANDLER, et al., Petitioners/Appellants,

v.

STATE OF FLORIDA, Respondent/Appellee.

[September 27, 1979]

PER CURIAM

This cause reaches us by way of petitioners' assertion of appellate jurisdiction and petition for writ of certiorari from a decision of the District Court of Appeal, Third District, reported at 366 So.2d 64. We have no appellate jurisdiction, as the district court expressly declined to rule upon the constitutional issue. Chandler v. State, 366 So.2d 64, 69 (Fla. 3d DCA 1978).

Nor do we have certiorari jurisdiction. No conflict has been demonstrated, and the question of great public interest certified to us by the district court has been rendered moot by the decision in Petition of Post-Newsweek Stations, Florida, Inc., No. 46,835 (Fla. Apr. 12, 1979).

Accordingly, the petition for writ of certiorari is denied.

It is so ordered.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Writs of Certiorari and An Appeal from the District Court of Appeal,

Third District - Case No. 77-2624

Joel Hirschhorn of Hirschhorn and Freeman; and Richard M. Gale, Miami, Florida,

for Petitioners/Appellants

Jim Smith, Attorney General; and Calvin L. Fox, Assistant Attorney General, Miami, Florida,

for Respondent/Appellee

U.S.
OCT 3 1980
MICHAEL RODAK, JR., CLERK

# In The
# Supreme Court
## of the
# United States

**OCTOBER TERM, 1979**

**NO. 79-1260**

Noel Chandler and Robert Granger,
*Appellants,*

*vs.*

State of Florida,
*Appellee.*

**On Appeal from the Supreme Court of Florida**

## BRIEF OF APPELLANTS

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# In The
# Supreme Court
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**OCTOBER TERM, 1979**

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**NO. 79-1260**

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Noel Chandler and Robert Granger,

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**On Appeal from the Supreme Court of Florida**

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**BRIEF OF APPELLANTS**

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## OPINIONS BELOW

The opinion of the Florida Supreme Court (App. 3-4)[1] is reported at 376 So.2d 1157 (Fla. 1979). The opinion of the District Court of Appeal of Florida, Third District (App. 7-25) is reported at 366 So.2d 64 (Fla.3d DCA 1979).

## JURISDICTION

The Florida Supreme Court denied Appellants' Petition for Rehearing on December 10, 1979 (App. 9-10). Appellants filed their Notice of Appeal on January 3, 1980 (App. 26). Appellants' Jurisdictional Statement was filed in this Court on February 14, 1980. The Court noted probable jurisdiction on April 21, 1980.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

## QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

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[1]The following abbreviations will be used in this Brief: JS—Jurisdictional Statement; App—Appendix to Jurisdictional Statement; R—Original Record on Appeal; A—"Single" Appendix; AB—Appendix to Appellants' Brief.

## CONSTITUTIONAL PROVISIONS

*Amendment VI, to the Constitution of the United States, provides in pertinent part:*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

*Amendment XIV, to the Constitution of the United States, provides in pertinent part:*

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

## STATUTE INVOLVED[2]

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. 1978) was revised by the Florida Supreme Court to permit electronic media coverage of courtroom proceedings. The original Canon 3A(7), in pertinent part, provided:

> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . .

The Canon was revised to permit such coverage on an experimental basis in *Petition of Post-Newsweek Stations, Fla., Inc.*, 327 So.1 (Fla. 1976), *modified*, 337 So.2d 804 (Fla. 1976), *modified*, 347 So.2d 402 (Fla. 1977), *modified*, 347 So.2d 404 (Fla. 1977).

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[2]The Canon in question is considered a statute, under 28 U.S.C. §1257(2), where the constitutionality of same has been upheld by the highest State Court. *See In re Griffiths*, 413 U.S. 717 (1973) and *Mayer v. City of Chicago*, 404 U.S. 189 (1971).

Subsequently, Canon 3A(7) was permanently amended to permit electronic media and still photographic coverage of courtroom proceedings, and now provides:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending cause, electronic media and still photography coverage of public, judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. Sept. 1979).

## STATEMENT OF THE CASE

On July 5, 1977, Florida courts embarked on a one-year experimental program which authorized electronic media and still photographic coverage of all criminal (and civil) trials, while in progress, regardless of a defendant's objection to same. This rule was promulgated by the Florida Supreme Court pursuant to its general supervisory power under Article V, Section 2 of the Florida Constitution (1972), which authorizes that court to enact rules of procedure regulating the proceedings in all Florida courts.

Four days before the beginning of this "experimental" year, the Appellants, City of Miami Beach Police Officers at the time of their arrests, were charged by criminal information with conspiracy to commit a felony, burglary, grand larceny and possession of burglary tools arising out of the early morning, May 23rd, 1977, breaking into and entry of

Picciolos Restaurant, a well-known South Miami Beach dining spot (R. 1098-1101, J.S. 10). As detailed in the Jurisdictional Statement (J.S. 10-11), the unique facts and circumstances which led to Appellants' arrests, coupled with the popularity of the restaurant and the "breach" of trust by the two police officers made this case a "natural" for media to report, televise and publicize, during pretrial, trial and post-trial proceedings. Even the Assistant State Attorney prosecuting the trial termed this case "unusual" and "fascinating" during his opening statement to the jury (R. 206, 207). Earlier, the trial judge acknowledged the case presented "rather unique circumstances" (R. 42-43).

On July 21, 1977, Appellants filed their first motion seeking to have Florida's Experimental Rule 3A(7) declared unconstitutional as written and as applied (A. 3-4). The Trial Court declined to grant the requested relief, and instead "certified" the Rule's constitutionality to the Florida Supreme Court pursuant to the then-applicable provision of the Florida Appellate Rules (AB. 2). The Florida Supreme Court declined to rule on the "certified" question, dismissing same on the grounds that it was not "dispositive" of the criminal charges against Appellants (J.S. 11). *State v. Granger,* 352 So.2d 175 (Fla. 1977).

Thereafter, Appellants' case progressed on the trial docket. On October 25, 1977, Appellants renewed their motion challenging the constitutionality of the Experimental Rule (A. 5). This motion was denied by the trial court on the same day (A. 5-6) and by written order entered October 31, 1977 (AB. 4).

Prior to trial, on November 17, 1977, the Court conducted a hearing on Appellants' Motion to Suppress (R. 1129-1135) the tape recording of their conversations which had been intercepted by John Sion in a rather strange manner (App. 21). The tape was a critical item of evidence

linking the two police officers to the burglary of the restaurant (R. 1000). Fortuitously, the electronic media was not present (although newspaper reporters were) during the motion to suppress hearing at which Appellant Chandler testified and admitted using a "Walkie-Talkie" with co-defendant Granger, to "stage a bogus burglary" (R. 25-31, App. 21). The Trial Court denied the motion to suppress (R. 42-43, 1135).

Eighteen days later, Appellants' trial began in Dade County Circuit Court with the selection of the jury. Immediately prior to *voir dire,* Appellants made an *ore tenus* motion to remove the television camera and still photographer from the courtroom (A. 6-7). This was denied (A. 6). Similarly, an *ore tenus* motion to sequester the jury was made and denied (A. 6-7).

During jury selection, each member of the panel was questioned as to his or her ability to sit as a juror and to be "fair and impartial" despite the presence of a television camera during some, or all, of the proceedings (A. 12). All of the prospective jurors stated that they would not be "affected" in any way *(Id.),* although one juror at first said that she thought the presence of the television camera during the trial would lead her to believe ". . . there is something special about this case." (A. 9). Only two of the prospective jurors had ever been on television before (A. 10). A television camera was present during *voir dire* (A. 8). Following the selection and swearing of the jury, Appellants renewed their motion to sequester the jury because of the television coverage of the courtroom proceedings (A. 13). This was denied (A. 6, 13).

The Trial Court instructed the jury not to "watch, read or see" anything about the case on any of the media (A. 13). Just before the first night's recess, the Court advised the jury, "Perhaps it might be a good idea if you just avoid the local news and watch only the national news on television." (A. 13).

After the jury left for the evening, Appellants renewed their request that the witnesses be instructed by the court not to watch any television accounts of the testimony (A. 14). The trial court declined to do so on the grounds that the "problem" was an "interesting academic one, but of no practical purpose whatsoever." *(Id.)*, because the trial court concluded "no witnesses' testimony was reported or televised in any way" *(Id.)*.

The very next morning during direct examination of the State's "main" witness, John Sion, (the "ham" radio operator who had overheard and tape recorded the "burglary in progress"), the Trial Court was forced to interrupt the proceedings, discontinue the witness' testimony, remove the trial jury, and admonish the television cameraman from WPLG[3] who apparently was doing something with his television camera which the Judge found distracting (A. 15).

The television camera was in place the entire afternoon session during the State's presentation of evidence (A. 15-16). No television camera was present during any portion of the Appellants' presentation of evidence. Neither Appellant testified, at trial, although several defense witnesses were permitted to testify by the trial court (R. 657-919). Other defense witnesses were not permitted to testify, for reasons not relevant to the issue presented herein (R. 657-689).

At the conclusion of all the evidence, the Judge reminded the jury to "carefully abide by the instructions" given to them at the beginning of the trial and before each recess (A. 16).

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[3]WPLG, Channel 10, Miami, Florida, is owned by Post-Newsweek Stations of Florida, Inc., which was the original proponent of the televised criminal trial rule.

The jury eventually convicted Appellants of all four charges against them (R. 1284-1291). The Trial Court immediately sentenced each of the Appellants to a total of seven years imprisonment to be followed by five years probation (App. 18). The Court then ordered that Appellants be taken into custody on the grounds that no Notice of Appeal had been filed, and they were, therefore, not entitled to bail pending appeal. The following day, Notice of Appeal having been filed, the Court set appeal bonds on both Appellants. Post-trial motions were first denied on the grounds that the Court lacked jurisdiction. Subsequently, on December 29, 1977, the District Court of Appeal temporarily relinquished jurisdiction to afford the Trial Court an opportunity to rule on the Appellants' post-trial motions (App. 18).

The Appellants' Motion for New Trial alleged, *inter alia*, that they had been denied a fair and impartial trial through no fault of their own (R. 1303). The Trial Court denied that motion without giving Appellants' counsel an opportunity to state specific grounds (R. 1096).

Thereafter, the Florida District Court of Appeal affirmed Appellants' convictions holding, with respect to the issue relevant here, that permitting the electronic media to televise portions of Appellants' trial over their objections did not deprive them of their constitutional rights to a fair trial, due process of law or an impartial jury, as written or applied (App. 19-20). The District Court based its decision on the assumption that the Florida Supreme Court, having decided to permit camera coverage of criminal trials, on an experimental basis, must have determined that such coverage did not violate the Federal and State Constitutions *(Id.)*. The District Court of Appeal did certify the constitutionality, *per se*, of the Experimental Canon to the Florida Supreme Court as "a question of great public interest" *(Id.)*.

Thereafter, the Florida Supreme Court denied the appeal holding that the District Court of Appeal "expressly declined to rule upon the constitutional issue," dismissed the petition for writ of certiorari on the grounds that "no conflict has been demonstrated," and determined that the certified question was rendered moot as a result of its decision in *Petition of Post-Newsweek Stations of Florida, Inc.*, 370 So.2d 764 (Fla. 1979) which was rendered *after* the District Court of Appeal's decision (App. 3-4). *Post-Newsweek, supra,* is the non-adversarial decision amending Canon 3A(7) which first experimentally, and now permanently, authorized television coverage of all trial and appellate proceedings in Florida courts, regardless of an objection by a participant or defendant.

Neither the Florida Supreme Court, nor the District Court of Appeal ever discussed *Estes v. Texas,* 381 U.S. 532 (1965), in their decisions affirming Appellants' convictions (App. 3-4, 7-25).

Appellants timely filed their Notice of Appeal to, and Jurisdictional Statement in, this Court. Mr. Justice Lewis F. Powell, Jr. granted Appellants' motion for a continuation of the stay of proceedings originally entered by the Florida Supreme Court (App. 32-33, 5-6), as a result of which Appellants are still at liberty on their respective appeal bonds.

## SUMMARY OF ARGUMENT

### I.

The Sixth Amendment guarantees the accused the right to a public trial. This right is personal to the accused. The media has no right greater than the general public's to attend criminal trials. While news reporters are entitled to access to the courtroom as a natural corollary of the public's "right to know," this "right of access" is not without its limitations.

Criminal trials were never intended to serve as an entertainment medium or as an educational "teaching" device. The press is not entitled to take advantage of the accused's "plight in the toils of the law." To permit electronic media to broadcast criminal trials in progress over a defendant's objection would deal a fatal blow to the historical meaning of the Sixth Amendment.

## II.

The media's "right of access" to the courtroom, whether predicated on First or Sixth Amendment guarantees, is not superior to the public's right of access. This case does not present a "closure" attempt, but rather an effort by Appellants to keep the balance "nice and true" between the accused's right to a fair and impartial trial, and the media's right to gather news. Courts have the inherent power to prohibit broadcast media from televising pretrial or trial proceedings, and even to limit the public's access to courtrooms, where necessary, in order to prevent erosion of the right to a fair and impartial trial.

The First Amendment does not carry with it, the "unrestrained right to gather information."

## III.

The mere presence of television and still photographic cameras during a criminal trial is inherently prejudicial and denies the accused his right to a fair and impartial trial. This Court has previously held that in "notorious" cases at least televising portions of pretrial and trial proceedings denied the defendant basic Constitutional rights, *Estes v. Texas*, 381 U.S. 532 (1956). The *Estes* Court could not agree on the sweep of the rule prohibiting televising trials in progress. This case, while not "notorious" is at least "more than routine," and therefore, offers the Court an opportunity to squarely face and deal with the constitutional question.

Television news gathering is different than other forms of media. The presence of the camera causes different, perhaps unidentifiable, reactions in jurors and witnesses. Socio-psychological studies support the conclusion that when people are distracted, their decision making abilities are altered. Similarly, when people involved in decision-making lose their anonymity, judgments are more likely to conform to socially acceptable opinions, rather than privately held views.

The mere presence of a television camera in the courtroom has a Constitutionally significant "inhibiting" effect upon witnesses, jurors and attorneys. As a result, the defendant's rights to effective assistance of counsel, to compel favorable witnesses, and to confront and cross-examine his accusers, are all impaired. The cost to individuals in terms of denial of due process of law far outweighs whatever benefit, if any, society derives from watching highly selected, frequently lurid glimpses of the judicial process.

Continued television coverage of criminal trials is likely to erode the public's perception of, and confidence in, our system of jurisprudence. The viewing public will hardly understand the terse granting of a televised motion to suppress on a mere "technicality" after it has seen the defendant admit the commission of the offense, (for "standing" purposes).

Commercial needs will compel even more competitive broadcasting of trials in the course of which, the public's perception of the scales of justice will be badly tarnished.

In short, there is no Constitutional basis to justify televising a criminal trial, especially when one considers the damage which will result to our basic freedoms.

## IV.

Permitting electronic media and still-photographic coverage during a criminal trial over the defendant's objection denies the accused due process of law guaranteed by the Fourteenth Amendment. Such a constitutional deprivation may be found without an affirmative showing of actual prejudice. Pervasive pretrial publicity and the intrusion of news media into the trial process itself, frequently alters the constitutionally required judicial atmosphere so as to prevent the defendant from receiving a fair and impartial trial through no fault of his own. Where the presence of television cameras involves "such a probability that prejudice will result" due process of law considerations prevail. A "fair trial in a fair tribunal" is a basic requirement of due process of law. The mere presence of television cameras in a criminal proceeding destroys the ability of the accused to receive a fair and impartial trial as a matter of due process.

The Florida Supreme Court's failure to conduct scientifically reliable, and constitutionally valid studies prior to instituting the experimental year fatally taints Appellants' convictions. The Florida Supreme Court authorized the televising of criminal trials without first assuring itself that no one's individual liberties would be impaired. *Post hoc* studies conducted at the conclusion of the experimental year reflect a total failure on the part of the Court to properly test and measure the results of the experiment.

A careful analysis of the "In House" study conducted by the Florida Supreme Court at the conclusion of the experimental year clearly establishes that the conclusions drawn from the study are scientifically unsound and constitutionally deficient. In many cases the Florida Supreme Court overlooked critical data in attempting to

justify the experiment. The survey conducted by the administrative arm of the Florida Supreme Court, suffers from a significant lack of objectivity and serious departure from the "scientific" method.

A constitutionally significant number of witness and juror respondents to the survey established that their own acts, conduct, behavior, self-perception and roles in the televised criminal trials were affected by the presence of electronic and still-photographic media.

Due process of law compels the conclusion that the courtroom must be closed to the camera's eye. Where the State employs a procedure which produces a probability that prejudice will flow therefrom, this Court has not hesitated to strike down such procedures as "inherently lacking in due process of law." Even though one may not put his finger on the "specific mischief" caused by television, by its very nature, television causes prejudice to an accused contrary to his Sixth and Fourteenth Amendment rights.

## I.

## THE SIXTH AMENDMENT GUARANTEES THE ACCUSED THE RIGHT TO A PUBLIC TRIAL.

### Denying Electronic Media and Still Photographic Coverage of Criminal Trials in Progress Will Not Offend the Sixth Amendment.

That the Sixth Amendment guarantees the accused the right to a public trial is beyond debate and discussion. The Constitution clearly states that it is the *accused's* right, not the public's. It is the defendant's sacred right, not that of the

press. In short, "the Sixth Amendment right to a public trial is a right of the accused, and of the accused only. . . ." *Geise v. United States,* 265 F.2d 659, 660 (9th Cir.), cert. denied, 361 U.S. 842 (1959).

This basic tenet of our criminal justice system was reaffirmed by this Court at its last term in *Gannett Co. v. De Pasquale,* U.S. , 99 S.Ct. 2898 (1979). There Mr. Justice Stewart, delivering the opinion for the Court stated:

> For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials. *Id.* at 2911.

Even the four members of this Court who could not join in Justice Stewart's opinion agreed that:

> By its literal terms the Sixth Amendment secures the right to a public trial only to "The Accused." *Id.* at 2924 (Mr. Justice Blackmun, concurring in part and dissenting in part).

Mr. Justice Blackmun's statement is, of course, consistent with his earlier opinion in *Faretta v. California,* 422 U.S. 806, 848 (1975), where he stated (while dissenting), "[T]he specific guarantees of the Sixth Amendment are personal to the accused."

On the other hand, it is clear that while ". . . a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial [citation omitted]. . . ." *Singer v. United States,* 380 U.S. 24, 35 (1965). *Sub judice* Appellants made no effort to obtain a "private" trial, but rather simply sought to preclude the presence of television cameras and still photographers from the courtroom while their trial was in

progress, consistent with the teachings of *Estes v. Texas,* 381 U.S. 532 (1965). No effort was made to impose a "gag" order, *cf. Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976); nor was any attempt made to exclude the public generally or to close the courtroom to print and/or electronic media reporters, *cf. Richmond Newspapers, Inc. v. Commonwealth of Virginia,* U.S.Sup.Ct. Case No. 79-243 (decision pending on jurisdiction and merits at present).

Members of the "Fourth Estate"[4] were welcome, only their television cameras and still-photographic equipment were sought to be barred. In short, Appellants sought to exercise their rights to a public trial without any effort to limit traditional methods of news-gathering in the courtroom.

The accused's right to a public trial is so deeply rooted in Colonial American History, that the founders of this nation and the draftsmen of our Constitution and the Bill of Rights hardly found it necessary to debate or discuss the reason for this aspect of the Sixth Amendment. Similarly, there is virtually no discussion of the *public* aspect of the right to trial in the Annals of Congress between 1789 and 1791. Colonial Congressional debate focused on venue and jury trial issues. In fact, the Sixth Amendment is virtually identical to James Madison's original proposal. 1 ANNALS OF CONG. 452 (1st Cong., Gales & Seeton, 1789). The House of Representatives

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[4]The term, "Fourth Estate" is attributed to the prominent 18th Century British statesman and philosopher, Edmund Burke, who is reported to have called the reporters' gallery in Parliament a "Fourth Estate." The other three were the clergy, the nobility and the bourgeois. Mr. Justice Potter Stewart, in an address given at the Sesquicentennial Convocation, Yale Law School, on November 2, 1974 (as reported in the *American Statesman News,* (Austin, Tx.) Dec. 5, 1974, p. A-29) is reported to have explained the term as follows: "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the three official branches."

approved Madison's public trial "Amendment" on August 22, 1789. *Id.* at 808. The Senate reports are very sketchy, but the Conference Committee report was accepted by the House on Sept. 24, 1789. *Id.* at 948.[5]

Clearly the purpose was to protect the accused from "Star Chamber" proceedings and to afford the defendant free access to the advice and counsel of not only his attorney, but also his family and friends. *See generally* Magruder and Claire, *The Constitution,* 273-274 (1933) and Mathews, *The American Constitutional System,* 346 (1932). "A public trial however, is not necessarily one to which everyone may be admitted, but it must be sufficiently open to all the friends of the accused and others to witness the proceedings if they desire." Lee, *The Story of the Constitution,* 139 (1932). Neither James Madison, the draftsmen of the Bill of Rights, the States which ratified the first ten amendments, nor this Court, ever contemplated that the accused's right to a public trial would somehow be twisted to provide unlimited access to courtrooms by the (broadcast) media under either the First or Sixth Amendments.

The accused's "trials and tribulations," the personal trauma (whether deserved or not) of being subjected to the adversary system, the need to defend one's self and even be subjected to cross-examination, were never intended to be

[5]The accused's right to a public trial was first included in the 1677 Colonial Charter known as the West New Jersey Concessions, Chapter XXIII. B. Schwartz, I. *The Bill of Rights: A Documented History,* 129 (1971). Schwartz traces this right to Chapter 39 of the Magna Carta (1215). Pennsylvania was the first state to actually guarantee the accused a public trial in its constitution, Pennsylvania, Constitution, Declaration of Rights IX (1776). *In re Oliver,* 333 U.S. 256, 266, n.15 (1948); *United States ex rel Bennett v. Rundle,* 419 F.2d 599, 605, n.21 (3d. Cir. 1969) and *Stamicarbon, N.V. v. American Cyanamid Corporation,* 506 F.2d 532, 539 (2d. Cir. 1974).

made public spectacles, nor should they be permitted to become a form of entertainment or educational shows. This Court ". . . must take cognizance of the fact that the constitutional right of the accused to a public trial is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of [the accused's] involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law either while in jail, going or coming from court, or while actually in the courtroom." *Tribune Review Publishing Company v. Thomas,* 153 F.Supp. 486, 495 (W.D.Pa. 1957), aff'd, 254 F.2d 883 (1958).

More recently, Mr. Justice Douglas observed in *Illinois v. Allen,* 397 U.S. 337, 351 (1970), that:

> A courtroom is a hallowed place where trial *must proceed with dignity and not become occasions for entertainment* by the participants, by extraneous persons, by *modern mass media, or otherwise.* [emphasis added].

To yield to the electronic media's request would be tantamount to abandoning two hundred years of adherence to the concept of the *accused's* right to a fair and impartial public trial.

Public trials serve a "vital societal function" in that they promote "strict conscientiousness in the performance of duty" by the court, the parties, witnesses and presumably jurors. *See* 6 J. Wigmore, *Evidence in Trials at Common Law,* §1834 at 438 (Chadbourne rev. 1976). Permitting television cameras and still photographic equipment will not add to that "vital societal function" and, as will be demonstrated in Point III, *infra,* may well detract from the performance of that function. Precluding television cameras from the courtroom will still enable the accused to exercise

*his* constitutional right to a public trial, and likewise permit all media to gather news on an equal basis. In this manner, the "public's right to know" what occurs in criminal trials, *see In re: Oliver,* 333 U.S. n.15 at 266-276, will be preserved as a matter of principle, and the defendant's Constitutional right to a public trial, free from prejudice or outside influence, *see In re: Murchison,* 349 U.S. 133 (1955); *Tumey v. State of Ohio,* 273 U.S. 510 (1927) and *Estes, supra,* 381 U.S. at 593, will remain absolute.

## II.

## THE MEDIA'S RIGHT TO ACCESS TO THE COURTROOM IS NO GREATER THAN THE PUBLIC'S RIGHT, IN GENERAL.

### Neither the First Nor Sixth Amendments Compel the Presence of Broadcast Media in the Courtroom.

This is not a question involving First Amendment considerations. Appellants do not seek to preclude traditional methods of news coverage of trials in progress. The central issue is whether the electronic media's right to access to the courtroom is superior to the accused's right to a fair and impartial trial and to due process of law. While media proponents have sought to cloud the issue with First Amendment arguments, even the Florida Supreme Court, in its decision in *Post-Newsweek, supra,* 370 So.2d at 774, which engendered this litigation, rejected media's argument that the First and Sixth Amendments require entry of the electronic media into judicial proceedings.

Despite that conclusion, more than half of the states followed Florida's lead and "tinkered" with the hallowed trial process. According to the National Center for State Courts,

as of April 21, 1980, ten states have joined the "rush to electronic judgment" authorizing television, radio and still photographic coverage on a permanent basis (AB. 5-6). An additional sixteen states presently permit coverage on an "experimental" basis (AB. 7-9). and two states have enacted legislation which would appear to allow electronic media coverage (AB. 9). In sum, then, at present, at least twenty-eight states permit television coverage in one form or another.

The well financed and organized campaign by media to install television (yet another technological toy) in every courtroom in the United States has not, however, been without criticism from its own "brethren." The September 3, 1979 edition of *The New Yorker* magazine contained a rather caustic cartoon on the subject matter which "told" the entire story in a picture (AB. 10). Similarly, the April 23, 1980, edition of *The New York Times* published an article by George Gerbner, Dean of the University of Pennsylvania's Annenberg School of Communications, which suggested that television cameras do not belong in our courtrooms. The article's headline, "It's 11:30. And Heeeeere's Justice." says it all.

It clearly is a "trying task" to attempt to choose between free speech and fair trial, which are "two of the most cherished policies of our civilization." *Bridges v. California,* 314 U.S. 252, 260 (1941) (Mr. Justice Black). What is so incredible about the broadcast media's demands in America today is that no such request would ever be made in England, from whence our system of jurisprudence sprung. According to Harold Evans, editor of *The London Sunday Times,* "The idea of televising a trial [in England] ha[s] never been advocated by the boldest spirits in the press." 52 *Fla. Bar Journal,* 463 (1978).

There is little justification for a "running battle" between the courts and the press on this fair trial/free press

issue. Both are basic and sacred concepts in our system of government. This Court has endeavored mightily to preserve both and still "keep the peace" by placing emphasis on the Constitution and individual rights. This Court has had little difficulty in repeatedly holding (although admittedly by "split" votes) that members of the press do not have either a First or Sixth Amendment constitutionally guaranteed "right of access" greater than that afforded the public in general. *See, e.g., Pell v. Procunier,* 417 U.S. 817, 833 (1974); *Saxbe v. Washington Post,* 417 U.S. 843, 850 (1974); *Branzburg v. Hayes,* 408 U.S. 665 (1972); *Estes v. Texas,* 381 U.S. 532, 540 (1965); and *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 609-610 (1978). And, if that is so, how then can the broadcast media successfully claim a right of access superior to their own "brethren" in the printed media?[6] In fact, they cannot, for this Court has made it clear that the "right to access" to courtroom proceedings is not absolute. *Estes, supra,* and *Gannett Co., Inc., supra,* 99 S.Ct. at 2911. Moreover, as Mr. Justice Rehnquist pointed out in his concurring opinion in *Gannett,* at 2918:

> Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. See *post,* at 2921-2922; *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 609, 98 S.Ct. 1306, 1317, 55 L.Ed.2d 570 (1978); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514 (1974); *Pell v. Procunier,*

[6]In *Estes* the Court answered that very question: "It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. *This is a misconception of the rights of the press.*" 381 U.S. at 539. [emphasis added].

417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974); *Branzburg v. Hayes,* 408 U.S. 665, 684-685, 92 S.Ct. 2646, 2658-2659, 33 L.Ed.2d 626 (1972); *Zemel v. Rusk,* 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965); *Estes v. Texas,* 381 U.S. 532, 539-540, 85 S.Ct. 1628, 1631-1632, 14 L.Ed.2d 543 (1965). See also *Houchins v. KQED, Inc.,* 438 U.S. 1, 9-15, 98 S.Ct. 2588, 2594-2597, 57 L.Ed.2d 553 (1978) (opinions of BURGER, C. J., WHITE and REHNQUIST, JJ.); *id.,* at 2908 (STEWART, J., concurring). "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Ibid.* Thus, this Court emphatically has rejected the proposition advanced in Mr. Justice POWELL's concurring opinion, *ante,* at 2914, that the First Amendment is some sort of Constitutional "sunshine law" that requires notice, an opportunity to be heard and substantial reasons before a governmental proceeding may be closed to the public and press.

Mr. Justice Blackmun, (with whom Justices Brennan, White and Marshall joined) also observed in *Gannett, supra,* at 2922:

> Despite Mr. Justice POWELL's concern, *ante, this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings.* See, *e.g., Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 608-610, 98 S.Ct. 1306, 1317-1318, 55 L.Ed.2d 570 (1978); *Pell v. Procunier,* 417 U.S. 817,

834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974). [emphasis added].

Moreover, a careful reading of *Gannett* makes it clear that Mr. Justice Stewart's opinion for the Court concluded "that the Constitution provides no such [First Amendment] right [of access], greater than the public's right in general." 99 S.Ct. at 2913.

Thus, the invitation to expand the First Amendment, issued to this Court by *Richmond Newspapers, Inc.*, in its Brief on the Merits at pp. 27-43, ought to be declined, despite the apparently harsh closure facts presented in *Richmond Newspapers, Inc. v. Commonwealth of Virginia, supra.*

In any event, the question of "First Amendment access" is academic *sub judice,* because there was no closure order sought. The Appellants merely sought to preclude the presence of tape recorders, television cameras and still photographers from the courtroom. No effort was made to exclude either the general public or news reporters from either print or broadcast media. *See Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 609-610. Appellants did not seek to interfere with the broadcast media's reporters' rights to listen to, gather and write down "events that transpire[d] in the courtroom." *Sheppard v. Maxwell,* 384 U.S. 333, 362-363 (1965). Hence, *Nebraska Press Association v. Stuart, supra,* "gag" order principles do not come into play *sub judice.*

Appellants further contend that Courts have the inherent supervisory power to prohibit broadcast media from televising pretrial or trial proceedings where necessary to prevent interference with a defendant's rights to a fair and impartial trial, consistent with the teachings of *Estes v. Texas, supra,* and *Sheppard v. Maxwell, supra.* While, fortuitously, there was no broadcast media coverage of

Appellant Chandler's testimony during the Motion to Suppress hearing, the trial court certainly had the authority and could have closed the courtroom to prospective jurors to prevent them from being "prejudiced" or "tainted" by observing the accused admit, (for the purpose of the Motion to Suppress), the very acts, words, or deeds which, at trial, the State would be required to prove beyond and to the exclusion of every reasonable doubt (under the Florida standard) without the benefit of compelling the defendant's testimony. *See Rideau v. Louisiana,* 373 U.S. 723 (1963); *Estes v. Texas, supra; Sheppard v. Maxwell, supra;* and *Gannett Publishing Co., Inc. v. DePasqual, supra. See also Gannett Publishing Corp. v. Richardson,* 580 P.2d 49, 55 (Hawaii 1978).

Frequently media representatives, in their zeal to perform their professional responsibilities, overlook the "necessities" and "realities" of the criminal justice system. Rarely, if ever, has the press been concerned with whether its (even accurate) reporting of a matter might prejudice a defendant's rights to receive a fair and impartial trial. Mr. Chief Justice Burger's observation in *Nebraska Press Association v. Stuart, supra,* is most telling on this point:

> It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. 427 U.S. at 561.

How will the television stations' broadcast on the evening news, (reported in living color and live action), of the defendant's admission to the crime (during the Motion to Suppress hearing) "protect the rights of the accused to a fair trial by unbiased jurors," when the following morning the trial judge *denies* the Motion to Suppress and jury selection is commenced? This is a very real problem in Florida, for

example, where the accused has the right to file a Motion to Suppress at any time right up to, and including, the day of the commencement of the trial. Fla.R.Crim.P. 3.190.

Similarly, trial courts should have the inherent supervisory power to prevent members of the public in general from bringing into the courtroom their own noiseless 35mm still cameras and the now-so-readily-available portable video tape recorders and sound cameras which operate on batteries, do not require any special lighting and even have "slow motion" and "instant replay" features. *See Gannett Co., Inc. v. DePasqual, supra,* 99 S.Ct. at 2936 (Mr. Justice Blackmun concurring in part and dissenting in part); *Estes v. Texas, supra; Sheppard v. Maxwell, supra; Amsler v. United States,* 381 F.2d 37, 53 (9th Cir. 1967); and *Tribune Review Publishing Company v. Thomas, supra,* 153 F.Supp. at 494.

Finally, Appellants respectfully remind this Court that "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1 (1965). The broadcast media which asks this Court to ignore the accused's Sixth and Fourteenth Amendment rights and to overrule *Estes, supra, Sheppard, supra* and *Gannett, supra,* is the same "Fourth Estate" which unsuccessfully sought a court order authorizing the recording, for home television viewing, of anticipated executions at the Texas State Prison. *Garrett v. Estelle,* 556 F.2d 1274 (5th Cir. 1974), cert. den., 4380, 5914 (1978). One can only wonder what lofty First Amendment goal was sought to be promoted by such a macabre request.

## III.

## THE MERE PRESENCE OF TELEVISION AND STILL PHOTOGRAPHIC CAMERAS DURING A CRIMINAL TRIAL, OVER A DEFENDANT'S

OBJECTION, IS INHERENTLY PREJUDICIAL AND DETRACTS FROM ITS BASIC PURPOSE, THUS DENYING THE ACCUSED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

**A. *Estes v. Texas*, 381 U.S. 532 (1965), Revisited.**

As Mr. Justice Harlan succinctly observed in his concurring opinion in *Estes v. Texas, supra,* 381 U.S. at 587:

> The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings.

Appellants were not as "notorious" as Billie Sol Estes, yet neither was the trial ". . . of a more or less routine nature." *Id.*

Thus, the decision in this case will fill the hiatus left in this area by the various separate opinions of the *Estes* court. While neither "fish nor fowl," Appellants are still entitled to the guarantee that their liberty ". . . should not be put in jeopardy because of actions of any news media." *Estes, supra,* 381 U.S. at 540 (Mr. Justice Clark quoting the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association).

The purpose of public trials is to protect the accused, not to entertain or even to educate. "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Id.* The televising of criminal trials does not contribute to, or otherwise promote, that lofty end. The Constitution and the Bill of Rights have survived, not because of "majority" rule, but because this Court has been ever vigilant to promote and protect the rights of the unpopular, the oppressed and the minority. "Any attempt to find an answer to the question of what effect do cameras in the courtroom have on the administration of justice which is based on what a majority thinks [see Point IV-D, *infra*], is way wide of the mark."[7]

The solution to the Constitutional dilemma is compounded by the "news media's penchant for extensively covering sensational trials." *United States v. Williams,* 568 F.2d 464, 467 (5th Cir. 1978). This has produced the "so-called 'media circus' cases," *Id.*, despite the "fair play" section of the Code of Ethics of the Society of Professional Journalists [Sigma Delta Chi], which requires "Journalists at all times [to] show respect for the dignity, privacy, rights and well-being of people encountered in the course of gathering and presenting news." Furthermore, the Sigma Delta Chi Code states, "The media should not pander to morbid curiosity about the details of vice and crime." The answer, of course, is found in the "Responsibility" section of the Sigma Delta Chi Code: "The public's right to know of events of public importance is the overriding mission of the mass media." And, the "Ethics" section of the Code makes it poignently clear, "Journalists must be free of obligation to any interest other than the public's right to know."

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[7]Report and Recommendations of the *Ad Hoc* Committee of the Bar Association of Greater Cleveland, on the Effect of Cameras in the Courtroom on the Participants in Such a Trial, 51 Cleveland Bar J., 172, 174 (May, 1980).

It is, therefore, understandable, though regretable, that "not a term passes without this Court being importuned to review a conviction had in States throughout the country where substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts. . . ." *Irvin v. Dowd,* 366 U.S. 717, 730 (1961) (Mr. Justice Frankfurter concurring). Now, this Court will be treated to a never-ending parade of "three-ring circuses" arising out of the experiment in "live broadcast justice." It is already clear that jurors, being fallible, have a difficult enough time attempting to ". . . reach a disinterested verdict based exclusively on what [is] heard in the Court, when, before they [enter] the jury box, their minds [have been] saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Irvin, supra,* 366 U.S. at 729-730. With the continuation of televised criminal trials, the "mischief" presaged by Mr. Chief Justice Warren in his concurring opinion in *Estes, supra,* 381 U.S. 552-586, will fall upon our system of jurisprudence like the Ten Plagues on the House of Egypt.

The broadcast media now has the ability to determine which criminal cases shall become "notorious," which ones shall present a *"cause célèbre," Estes, supra,* 381 U.S. at 545, simply by setting up a tripod in the Courtroom. Appellants' case, while not "run-of-the-mill," was not notorious. Appellants' case presents this Court with the clear opportunity to "draw the line" finally and firmly, to close the doors to the "snouts," *Id.* at 568, of the "zoom" lens, *Id.* at 578.

### B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently.

As Jaques said:

All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts. . . .

Shakespeare, "As You Like It," Act II, Sc. vii, 139.

Whether the juror will be distracted, influenced, inhibited, intimidated or unaffected by the presence of television cameras during the trial will never be known "beyond and to the exclusion of every reasonable doubt." What is known, however, are the following facts:

1. Most people have difficulty doing an important task or trying to understand complex messages while being subconsciously distracted by music.[8]

2. When people lose their anonymity, they are more likely to surrender their own personal convictions for a more socially acceptable opinion.[9]

That is to say there is increased pressure to "conform" when the jury loses its anonymity. Why are jurors required to deliberate in secret? Why are lawyers and parties generally prohibited from interviewing jurors post-verdict unless leave of Court is given? Because, there is a time-honored tradition of the sanctity of the jury's deliberations and verdict. Public broadcasting of the members of the jury, and highly edited, sensationalized portions of the trial will adversely affect the jurors' role.[10]

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[8]Regan and Cheng, *Distraction and Attitude Change: A Resolution*, 9 Journal of Experimental Social Psychology 138 (1973).

[9]Mouton, Blake & Olmstead, *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity*, 24 Journal of Personality 339 (1956).

[10]See, Raven, *Social Influence on Opinions and the Communication of Related Content*, 58 Journal of Abnormal and Social Psychology, 119 (1959); *See also* Deutsch & Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 Journal of Abnormal and Social Psychology, 629 (1955).

The more public a trial is, the more jurors will tend to distort the content of the trial and change their opinions in the direction of the group or community norm, even if the jurors' individual opinions are to remain anonymous. For example, picture the situation of a "liberal" juror living in a "conservative" community. Making the trial more public (which would have the effect of identifying the jurors with the verdict visually and publicly) might cause the "liberal" juror to conform to the "conservative" community opinion. A conviction might well be obtained if the trial was televised, whereas if the trial was kept more private, the jurors more anonymous, the liberal juror might just stick to his private opinion, the result being a "hung" jury, or possibly, ultimately, an acquittal.

This is not to suggest, of course, that jurors are not, or should not, be accountable to the community. They are, as is the system itself. However, inherent to our system is the concept of "jury pardon" and even "irrational" or "illogical" verdicts. While our present system of criminal justice may not be perfect, it is certainly far better than that which has previously been known to man.

> 3. Nonanonymous groups have far more difficulty making decisions than anonymous groups. In an interesting and unique study, "mock" juries were informed that they would be publicly examined, after their verdict. Those "nonanonymous" juries exhibited considerably different patterns of change in opinion than did the mock juries who were told that deliberations would remain private.[11]

[11]Davis, Strasser, Spitzer & Holt, *Changes in Group Members' Decision Preferences During Discussion: An Illustration With Mock Juries*, 34 Journal of Personality and Social Psychology 1177 (1976). But *see*, Point IV-D *infra*, which points out the difficulties of accurate measurement based on "mock" juries.

4. Finally, in a now classical series of studies by the prominent social psychologist, Dr. Solomon E. Asch, it is clear that "social forces" can easily induce subjects to "surrender" their own private convictions for the sake of conformity and to avoid public ostracism.[12]

Obviously, since jurors arrive at decisions based on observations of the witnesses, the quality of testimony and other factors, where a witness is affected by the presence of broadcast media (*See* Point IV-D, *infra*), there will be a spill-over effect. *See United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 105 (5th Cir. 1974). (Unique prejudicial impact of being telecast.)

According to one study,[13] the respondent participants in trials televised in Florida during the experimental year,

> . . . were puzzled as to whether cameras affected witness behavior. While slightly over one in five respondents felt television and still cameras inhibited witness testimony, over one in four reported uncertainty about this issue.
>
> Since jurors rely upon testimony by witnesses to help reach a decision, it is particularly intriguing to examine juror perceptions of how cameras affect such testimony. Our subsample of 45 jurors who had experienced television cameras and 51 who had served in trials covered by still cameras responded similarly to the other respondents. About one in six

[12]Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs: General and Applied 1 (1955).

[13]Pryor, Strawn, Buchanon & Meeske, *The Analysis of On-The-Scene Responses to Cameras in the Courtroom*, 45 Southern Speech Communication Journal, 12, 22 (Fall, 1979).

believed that television cameras inhibit testimony while one in five found still cameras inhibiting.

In addition, a large number of jurors, almost one-third, were uncertain about TV and still camera effects on testimony. Of the witnesses who responded to this item, two of nine believed that television cameras inhibited testimony, while none of five reported adverse effects of still cameras.

In light of those findings, developed by a team of three University of Central Florida academicians and a former State of Florida Trial Judge (who is now an active trial attorney), Appellants cannot understand why the Attorney General of the State of Florida would continue to press for affirmance of a Rule of Court which had the effect of seriously "inhibiting" witness testimony.[14]

Recently the American Bar Association retained a prestigious New York public opinion research firm to conduct a random cross-section public opinion pole focusing on various news media-court issues. Sixty-eight percent of the attorneys sampled, on a national basis, opposed cameras in the courtroom. Kane, Parsons and Associates, Inc., *ABA LawPoll,* at pg. 39 (April, 1979). Seventy-five percent of the respondent attorneys "agreed that television would distract witnesses." *Id.* at 43. Only thirty-seven percent thought that televising courtroom proceedings would "enhance the public concept of our system of justice." *Id.* at pg. 45.

[14]It is a well-known fact which needs no citation that most victims and third-party witnesses are "unhappy" about being "involved" to begin with. Many, many state prosecutions are lost or dropped, because of witness reluctance to "come to court." Now the State of Florida offers these unwilling and disinclined people the opportunity to be harassed, embarrassed, inhibited, distracted, and televised on the evening news, in addition to the normal rigors of direct and cross-examination.

Additional problems of Constitutional dimension are raised by the presence of broadcast media during a trial over a defendant's objection:

> 1. The accused's right to effective assistance of counsel may be impaired;
>
> 2. The defendant's right to compel favorable witnesses to testify in his own behalf may be rendered meaningless, where, for example, the witness refuses to come forward, electing to face a contempt of court citation, rather than being forced to testify on "stage," *cf. United States v. Kleinman,* 107 F.Supp. 407 (D.C.D.C. 1952);
>
> 3. Witness *and juror* sequestration will have to be imposed in every case which is broadcast, "human nature being what it is" to assure the defendant of a fair and impartial trial free from "outside influences." And, of course, due process of law cannot be measured in terms of dollars and cents. *See Gagnon v. Scarpelli,* 411 U.S. 778, 788 (1967).

### C. Continued Television Coverage of Trials Is Likely to Erode the ". . . Fundamental Conception of What a Trial Should Be." *Estes, supra,* 381 U.S. at 580 (Mr. Chief Justice Warren Concurring).

The public's perception of justice is an important element in maintaining respect for, and decorum in, our courts. While ". . . public knowledge and understanding of the judicial process [may be] at a low ebb [in Florida]," *Post-Newsweek, supra,* 370 So.2d 764, that is hardly sufficient justification for the rule in question. Moreover, it is extremely unlikely that the public gained any significant knowledge or

better understanding of, and more respect for, the traditional system as a result of the media's broadcasting of the *Zamora,*[15] *Bundy,*[16] *Jones*[17] or *McDuffie*[18] debacles.

Do we really expect the viewing public to truly understand the trial court's granting the defendant's Motion to Suppress on the grounds of a *Miranda,*[19] *Collidge,*[20] or *Dunaway*[21] violation? Especially, when the television camera

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[15]*See* Part IV-D, *infra,* at n.33.

[16]The now infamous Theodore J. Bundy was made a national television star. The broadcast media did for Bundy what he could not do for himself. A law school dropout, now twice convicted of murder and sentenced to the electric chair, Bundy acted as his own attorney in the presence of national television coverage.

[17]The case of *State of Florida v. Johnny Jones,* tried recently in Dade County, Florida is another prime example of media excess. Dr. Jones, a prominent Black leader in the Miami community, who was also the Superintendent of the Dade County, Florida School System, was tried and convicted (in the press first) of grand theft under the daily glare of special television lighting (AB. 16-18). The *Jones* trial, broadcast every evening by PBS from "gavel-to-gavel" produced several rather unusual events. In addition to the lighting problem, for example, the trial judge, concerned with the public's view of the prosecutor and defense attorneys' vociferous verbal attacks (on each other) told the lawyers in open court, while in session, to "shake hands." The Miami-Herald, April 27, 1980, Section B, at 6, Col. 1. Thus, the Black community was able to see its hero, Dr. Johnny Jones' trial everyday from beginning to end. His conviction brought dismay to the school system and the Black community. Dr. Jones' case, rushed through the prosecutor's office and to trial, partially because of the barrage of adverse publicity, was one of several cases involving black/white confrontations which were the subject matter of much discussion, following what has now been called the "McDuffie" riots in Miami as noted in n.28 *infra.*

[18]See n. 28 *infra.*

[19]*Miranda v. Arizona,* 384 U.S. 436 (1966).

[20]*Collidge v. New Hampshire,* 403 U.S. 443 (1971).

[21]*Dunaway v. New York,* U.S. , 99 S.Ct. 2248 (1979).

"zooms in" on the defendant just as he admits the crime? The lack of the voluntariness of his consent to search, or knowing waiver of his right to counsel, will probably not be aired because of time limitations, commercialism and lack of sensationalism.

Will the need to intersperse portions of the trial with ". . . commercials for soft drinks, soups, eye-drops and seat covers . . ." *Estes, supra,* 381 U.S. at 571, improve the image of justice in America today? Or, will it take such "all-American" advertising as ". . . a dog food . . . and a [Joe Namath] panty hose commercial . . . [or perhaps a 'mean Joe Greene' Coca-Cola ad]," *Post-Newsweek, supra,* 370 So.2d at 776, to "turn the trick" and increase the ratings? How will television and still photographic cameras contribute to the "dignity, decorum and courtesy" of the courtroom? Hazard, *Securing Courtroom Decorum,* 80 Yale Law J. 433, 434 (1970). The list of courtroom rituals, well known to the trial bar, which serve to promote the dignity and decorum of the courtroom, such as the "wearing of the robe"[22] and the solemn austere administration of the "oath," ". . . to tell the truth, the whole truth and nothing but the truth . . . ,"[23] will become as commonplace as the routine at "Archie Bunker's Tavern."

### D. There is No Constitutional Basis to Justify Televising a Criminal Trial.

As stated previously, the First Admendment generally grants the press no right to information about a trial superior to that of the general public. *Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 609. Similarly, the

[22]*See* Kennedy, *The Cult of the Robe: A Dissent,* 14 Fordham L.Rev. 192 (1945).

[23]Comment, *Effects of Kinds of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony,* 84 Harv.L.Rev. 1620, 1636 (1971).

Sixth Amendment does not require that the trial, or any part of it, be broadcast live or on tape to the public. *Id.* at 610. The broadcast media cannot "run the show." For as observed in *Dieteman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (civil suit seeking damages for alleged violation of invasion of privacy), the ever "increasing capabilities . . . of electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities and expose his most personal characteristics to public gaze." *Id.* at 248. While the criminally accused may have no "right of privacy" as to what is said in open court, other unwilling trial participants such as jurors and witnesses ". . . should not be required to take the risk that what is heard and seen will be transmitted by photograph, or recorded in full living color and hi-fi, to the public at large." *Shevin v. Sunbeam T.V. Corp.*, 351 So.2d 723 (Fla. 1977), appeal dismissed, 435 U.S. 920 (1978).

Broadcast media, and the Florida Supreme Court would do well to heed the words of Chief Judge Gourley, who wrote in *Tribune Review Publishing Company v. Thomas, supra,* 153 F.Supp. at 494:

> *The sanctity and inviolability of the court room is the keystone which supports and buttresses the great, massive arch of freedom, and to weaken this keystone is to invite real peril to our basic freedoms. In short, the greatest danger to freedom may well stem from those who seek the license and luxury of increased liberties at the expense of the process which feed life blood to our free institutions.* [emphasis added].

## IV.

## PERMITTING ELECTRONIC MEDIA AND STILL PHOTOGRAPHIC COVERAGE DURING A CRIMINAL TRIAL, OVER THE DEFENDANT'S OBJECTION, DENIES THE ACCUSED DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT

### A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice.

Whether the accused is a "rich man, poor man, beggarman, thief, doctor, lawyer, merchant, chief," Gould and Gould, *Annotated Mother Goose* (New American Library, 1967), he is entitled to the constitutional guarantee that he not be deprived of "life, liberty or property, without due process of law." Amendment XIV. The televising, in part or whole, of a criminal trial, denies the accused that right. "Television reshapes the way we perceive reality. Before we allow television in even one more courtroom, we must know more about its effects on criminal trials and on our image of justice." Gerbner, *Trial by Television: Are We at the Point of No Return?* 63 Judicature 416 (1980).

It is abundantly clear that pervasive publicity and the intrusion of news media into the trial process itself can so alter, or destroy, the Constitutionally necessary judicial atmosphere and decorum so that the defendant is denied the requirements of impartiality to which he is entitled as a matter of due process of law. *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Rideau v. Louisiana, supra;* and *Irvin v. Doud, supra.* And, the Appellant need not necessarily make an affirmative showing of actual prejudice. "Indeed where the circumstances involve a probability that prejudice

will result, it is deemed inherently lacking in due process. *Sheppard v. Maxwell,* [citation omitted] and *Estes v. Texas,* [citation omitted]." *State v. Stiltner,* 491 P.2d 1043, 1048 (Wash. 1971). *Estes* clearly controls the case at bar. In *Estes, supra,* the trial court held that the presence of television cameras *"involves such a probability that prejudice will result that it is deemed inherently lacking in due process."* 281 U.S. at 542, [emphasis added], (but *see Bradley v. State of Texas,* 470 F.2d 785 (5th Cir. 1973)) (Affirmance of denial of state prisoner's Federal Habeas Corpus petition which alleged violation of due process where court allowed "still and motion photography" of portions of trial). Because the Court decided *Estes* by a five-to-four vote, media proponents claimed that the courtroom door was left ajar, permitting the re-entry of cameras at a future date.[24] Unfortunately, this

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[24]These views are derived primarily from Mr. Justice Harlan's concurring opinion in which he limits the rule of *Estes* to cases "notorious" in nature. Justice Harlan also reserved ruling on the "run-of-the-mill case" for a future time, but admitted that possibly no workable distinction can be drawn based upon the type of case involved.

The second basis from which media proponents have drawn support is Justice Harlan's statement in concurrence:

> [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. 381 U.S. at 595.

Any such reliance upon Justice Harlan's views is misplaced. He does not cast his concurring vote subject to technological improvements. It is not quieter cameras alone which make television more "commonplace an affair in the daily life of the average person." It is psychological and sociological attitudes toward television, and what jurors, witnesses and judges as trial participants and what the viewing public in general believe television represents which will affect television's likely disparagement of the judicial process to the accused's detriment. (See Point III, *supra.)*

optimism has not been bolstered by any showing that the presence of cameras has any less potential for "mischief" now than in 1965. Appellants acknowledge that the cameras' *operations* are less disruptive by virtue of technological improvements (but see R. 374). It is clear, however, that this Court's primary cause of concern was the impact of the camera's *presence* upon the trial's participants, and the jury in particular. Mr. Justice Clark, speaking for the Court, assessed the subtle dangers upon the jury as: 1) the impact of the juror's awareness of the media's interest in the case; 2) the potential distraction from the proceedings; and 3) in the event of a new trial, potential jurors often will have seen and heard telecasts of the original trial. *Estes, supra,* 381 U.S. at 545-548.

Mr. Justice Clark wrote *Estes* for the Court. Chief Justice Earl Warren, and Justices Douglas, Harlan and Goldberg, joined in the Court's judgment. Mr. Justice Harlan concurred in the Court's opinion, subject to certain reservations set out in 381 U.S. at 587-596. Mr. Justice Harlan succinctly stated:

> My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing televisions in the courtroom so far outweigh the counter-veilling [sic] factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment. *Id.* at 587.

Mr. Chief Justice Warren, (joined by Justices Douglas and Goldberg), also wrote a concurring opinion in *Estes* and said at 381 U.S. at 552.

> *While I join in the court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so* . . [emphasis added].

The Chief Justice went on to state:

> I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) That the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trial; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others. *Id.* at 565.

Mr. Justice Stewart dissented in *Estes* and was joined by Justices Black, Brennan and White. Mr. Justice Stewart wrote:

> I think that the introduction to television into a courtroom is, at least in the present state of the art an extremely unwise policy. It involves many constitutional risks, and detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional rule. 381 U.S. 601.

While one could speculate as to what type of rule Mr. Justice Stewart would now promulgate, Appellants believe that Mr. Justice Brennan's joinder in Mr. Justice Stewart's

opinion was likely a result of the "preferred" position they have given the First Amendment as expressed in numerous obscenity cases. Justices White and Brennan also contributed separate dissenting opinions.

Appellants contend ". . . the nub of the question is not [television's] newness but, as Mr. Justice Douglas says, 'the insidious influences which it puts to work in the administration of justice.' Douglas, *The Public Trial and The Fair Press*, 33 Rocky Mt. L. Rev. 1 (1960)" *Estes, supra*, 381 U.S. at 541 (Mr. Justice Clark). As stated *In re Murchison, supra*, 349 U.S. at 625:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system has always endeavored to prevent even the *probability* of unfairness.
>
> * * * * *
>
> [T]o perform its high function in the best way 'justice must satisfy the appearance of justice' *Offutt v. U.S.*, 348 U.S. 11, 14, 75 S.Ct. 11, 13. . . . [emphasis added].

The mere presence of television cameras in a trial denigrates "the appearance of justice," *Offutt v. U.S., supra*, 348 U.S. at 14, and destroys the ability to "hold the balance nice, clear, and true between the state and the accused" *Tumey v. Ohio, supra*, 273 U.S. at 532.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell, supra*, 384 U.S. at 362. This Court must take those measures necessary to prevent such influences from infecting the courtroom. *Id.* While answering questions of "substantive

due process has at times been a treacherous field for this Court," *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 502, (1977), one central theme has emerged, under our system of justice, it is far better for "ten guilty men to go free than for one innocent person to be (unfairly, and without due process of law) convicted."

### B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints Appellants' Convictions.

The Florida Supreme Court cast the State judicial system in an uncharted sea when it authorized one year of televised trials. At least Columbus, when "sailing the ocean blue," had a sextant and the stars to guide his voyage. Except for specifying the kinds of photographic and audio/visual camera equipment which could be brought into the courtroom, no apparent effort was made to establish a "scientific method" by which the experiment could be intelligently and meaningfully monitored, measured and analyzed. The Institute for Study of the Trial at the University of Central Florida prepared a report on the experiment which stated:

> Insufficient courtroom photograph data have been collected to identify all of the ramifications of camera usage or to interpret adequately the initial reactions of judges, attorneys, and the public. The experiment of only one year has produced too little data. More time is needed to permit the newly-formed opinions to incubate and mature so that additional research can be conducted to measure the long-term effects of cameras on the trial process.

Pryor, Strawn, Buchanan and Meeske, *The Florida Experiment: An Analysis of On-The-Scene Responses to Cameras in the Courtroom,* 45 Southern Speech Communication Journal 12, 24 (Fall, 1979).

This study, conducted by a former trial judge, now part-time college professor and trial attorney, and the Chairman of, and two professors at, the University of Central Florida's Department of Communication, was submitted to the Florida Supreme Court *prior* to its decision to make the televised criminal trial rule permanent.

Similar "storm" warnings were given to the Florida Supreme Court both before initiation of the experimental period, after its conclusion, and before the *Post-Newsweek* decision converting the Experimental Canon into a permanent Rule of Court. As early as February 6, 1976, the Florida Bar, through its Assistant Executive Director for Legal Affairs, Richard C. McFarlain, suggested to the Florida Supreme Court that "Qualified research scientists from the Florida State University School of Social Science be authorized to conduct research and measuring tests before, during and after the [televised] trials." (AB. 11). Apparently no such research project was established either before, or during the experimental year. *Post-Newsweek, supra,* 370 So.2d at 767-768.

Incredibly, however, despite the fact that the Florida Supreme Court, in its Supplemental Interlocutory decision of April 7, 1977, in *Post-Newsweek, supra,* admitted it had "met with total failure in securing the conduct of a [televised] trial by consent of the parties" (App. 29), it converted the experimental rule from one which required a defendant's consent into one which did not permit a defendant to have any say in whether his trial was televised (App. 30). In light of the warnings that a "scientifically controlled study" was

necessary, the Florida Supreme Court's decision to proceed without one was akin to the Queen of Heart's remark to Alice, "No! No! Said the Queen. Sentence first — verdict afterwards." *Norton Critical Edition: Alice In Wonderland,* 96 (Gray ed. 1971).

At the conclusion of the Experimental year, the Florida Supreme Court commissioned an "in house" *post hoc* study (OSCA), the efficacy and validity of which will be discussed at Point IV-C, *infra.* Several prominent bar association groups, academicians, *amicus* and social scientists urged the Florida Supreme Court to conduct vigorous, carefully controlled socio-psychological studies before reinstating the broadcast media rule.[25]

It is not surprising, of course, that carefully controlled traditional psychological and sociological tests could not be conducted consistent with "the scientific method," for, after all *a jury trial* is neither a laboratory experiment, nor a game, the outcome of which can be erased and submitted to more sterile procedures, or "replayed in the event of rain." In its simplest form, the "controlled" experiment consists of ". . . selecting two samples at random from the same population and then exposing one — the experimental sample — to an additional influence. The effect of the fresh influence is determined by comparing the final characteristics of members of the experimental sample with those of members of the control sample which were not so exposed. Madge, *The Tools of Social Science,* 299 (Doubleday, 1965).

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[25]The requests for delay and further study were all filed in the Florida Supreme Court in the original record lodged there under Florida Supreme Court Case No. 46,835, *(In re: Petition of Post-Newsweek Stations, Florida, Inc., supra).*

"Despite those advantages, it is frequently impossible to conduct the 'controlled' experiment outside the laboratory. Moreover, because both the experimental group and the laboratory conditions have been artificially selected, the ultimate results may bear little relevance to real-life situations." Flango, *On the Difficulties of Studying Juries,* 63 Judicature 438 (April, 1980). Using college students or mock juries to conduct experiments presents difficulties which impeach the studies' relevance and reliability. *Id.*

The alternative method of testing is called "quasi-experimental," which is "field" testing. "A field experiment is a research study in a realistic situation in which one or more variables are manipulated *under as controlled conditions as the situation will permit."* Kerlinger, *Foundations of Educational Research,* 382 (Holt, Rinehart and Winston, Inc. 1967). "Field experimenting" with cameras in the courtroom while a defendant is being tried for murder, or as here for burglary, grand larceny, possession of burglary tools and conspiracy, is hardly consistent with traditional notions of our Constitutional system.

Once again it is not difficult to see why no control groups were set up during the one-year pilot. What is constitutionally perplexing, however, is the answer to the question, "Was the camera's presence *sub judice* a factor, conscious or subtle, in the jury's verdict?" Appellants contend that it was a negative factor. University of Pennsylvania's Annenberg School of Communications' Dean, George Gerbner, concurs in this contention:

> And so the bandwagon rolls on its road of nonsequiturs, misplaced demonstrations, self-serving tests and generally flawed 'experiments' that permit no controls, disproof, or evaluation. Gerbner, *Trial by Television: Are We At the Point of No Return?* 63 Judicature 416, 425-426 (April, 1980).

It is well settled that the beneficiary of the claimed constitutional error has the burden of establishing that it was "harmless." *Chapman v. California,* 386 U.S. 18, 24 (1967). *Sub judice,* Post-Newsweek, as the originator of this televised criminal trial rule had an obligation to establish *before* institution of the experimental rule that there was no interference with the accused's right to receive a fair and impartial trial and to due process of law. *Id.* This Post-Newsweek did not do, despite its obligation to "direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." *Nebraska Press Association v. Stuart,* 427 U.S. at 561.

Similarly, the Attorney General of the State of Florida, as the Chief law enforcement officer of the State, has that obligation. Interestingly, the Florida Attorney General at the time Post-Newsweek first proposed the televised criminal trial rule, filed an affidavit in the Florida Supreme Court in opposition to the rule change. When he became a candidate for Governor of Florida, his office had a "change of attitude" and supported the rule change, as obviously does the present attorney general. *Cf, Sheppard v. Maxwell, supra,* 384 U.S. at 345, (Opinion noted Trial Judge and Prosecutor "running" for election at time of trial).

Where there is a reasonable possibility that the presence of the camera may have affected the trial proceedings, the beneficiary of that claimed constitutional error has the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California, supra,* 386 U.S. at 24. Appellee cannot meet this burden *sub judice,* because no effort was made before institution of the experimental program to "test the waters." The *ex post facto* surveys and studies, which will be discussed in Point IV, commissioned and utilized by the Florida Supreme Court simply do not pass scientific reliability, much less constitutional muster.

### C. The "In House" Post Hoc Office of the State Court Administration (OSCA) Survey Commissioned by the Florida Supreme Court and Relied upon to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically" Unacceptable.

As indicated in Point IV, *supra,* at the conclusion of the year's experiment, the Florida Supreme Court directed the Office of the State Court Administrator (OSCA) to organize and circulate a questionnaire survey of all televised trial participants (except defendants) and to thereafter compile and publish the results of same. While the manner of the actual creation and organization of the questionnaire, and the assimilation of the material and results, is somewhat of a mystery, the Florida Supreme Court conceded "That the survey results [were] nonscientific and reflect only the respondent's attitudes and perceptions about the presence of electronic media in the courtroom." *Post-Newsweek, supra,* 370 So.2d at 768.

Appellants will analyze the individual constitutional significance of various survey questions in Part IV, *supra.* At this juncture Appellants contend that the OSCA survey relied on by the Florida Supreme Court in *Post-Newsweek, supra,* 370 So.2d 767-769 is totally inconclusive, constitutionally defective and simply not acceptable as "scientific" or "pseudo-scientific" "evidence." It is extremely doubtful whether such a survey, much less the conclusions drawn therefrom, would ever be admitted at a trial or judicial hearing, under current rules of evidence.[26]

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[26]Hearsay and expert witness objections aside, neither the Florida Evidence Code Ch. 90, Fla.Stat. (1979), nor the Federal Rules of Evidence, would appear to allow either the OSCA survey or its results to be admitted at a judicial proceeding because it lacks the requisite trustworthiness and credibility.

The OSCA survey suffers from the following major defects:[27]

1. It is a well established principle in research that any "in-house" survey is likely to approach its problems and weaknesses with somewhat less than complete objectivity; or at least bring to the problem a certain perspective or point of view. Even institutions, like the humans which run them, suffer from unconscious and unavoidable gaps in objectivity when asked to examine their own problems. This in no way implies a lack of integrity or insincerity on the part of the researchers. It is simply a characteristic of human nature which is inescapable.

2. The Survey itself suffers from the "halo effect," a counter-productive phenomenon inconsistent with true scientific study, in which each of the items under

[27]The critical analysis of the OSCA survey which follows is based on an examination of it by Dr. George J. Mouly (Ph.D.), a professor of Educational Psychology at the University of Miami, and author of *Educational Research: The Art and Science of Investigation* (1978) an expert in the areas of statistical analysis and survey researching. Dr. Mouly was privately retained by Counsel for Appellants in connection with a civil rights suit (filed pursuant to 42 U.S.C. §1983) which had been instituted in the United States District Court for the Southern District of Florida by the undersigned as counsel for other unrelated clients. The object of the civil rights action was to seek an injunction against the enforcement of Rule 3.110, Florida Rules of Criminal Procedure (incorporating amended Canon 3A(7) which authorized televised criminal trials on a permanent basis), and/or in the alternative, a declaratory judgment from that court that the televised criminal trial rule was unconstitutional. Dr. Mouly's critique was never utilized as evidence because the District Judge, Norman C. Roettger, Jr., granted the Attorney General's Motion to Dismiss the suit on the grounds of lack of subject matter jurisdiction (no actual case or controversy) in an unreported decision. That case, *Trinidad v. Stettin*, (S.D.Fla., Case No. 79-1905-Civ-NCR), is now pending on Appeal in the United States Court of Appeal, (5th Cir., Case No. 79-2555). Dr. Mouly "found a sufficient number of departures from minimal research requirements to suggest the need for considerable caution in the interpretation of [its] results" (AB. 14).

examination are approached from the same standpoint, as a result of which, the questions asked "color" or influence each other.

3. Many of the questions posed contain inherent "social desirability" factors, the effect of which interferes with the objectivity of The Survey. (An example are those questions which stress the concept of "government in the sunshine," a particularly "hot" political issue in Florida prior to, during and immediately after the experimental year.) These are "loaded" questions in which the respondent is subsconsciously steered to a preferred result.

4. According to the Florida Supreme Court, "The final survey questionnaires evolved through an eclectic process of review and modification by the Court, the parties, the OSCA staff and interested academicians." *Post-Newsweek, supra,* 370 So.2d 768. Although that statement sounds "nice," it is somewhat misleading.

While the selection process may have been "eclectic," it was hardly scientific or Constitutionally based. Of those four categories of individuals or institutions who participated in the "sifting and winnowing" process, two, the Florida Supreme Court and the Office of the State Court Administrator staff, were actually from, or of, the same "institution." The only "parties" to the nonadversary proceeding were the original proponent. *Post-Newsweek* and the Florida Bar. The latter, although originally opposed to the rule change, was obliged, under Florida's Integrated Bar Rules to act at the Supreme Court's pleasure once the decision had been made to implement the rule allowing broadcast media in the courtroom. The final category, "interested academicians," is as ambiguous as it is mysterious. Except for the name, Pauline Holden, Ph.D., University of Florida Criminal Justice Program (See *Post-Newsweek, supra,* 370 So.2d at 767, n.5), not a single person

is identified nor are the qualifications of the "interested academicians" set out anywhere in the *Post-Newsweek* decision. Nor can one glean from a reading of the decision, who actually retained and paid for the services of these "experts."

How then, under these circumstances, can this Court, or any appellant, attempt to properly appraise the validity of the OSCA study?

5. Overall, the OSCA survey obtained less than a two-thirds response (and barely fifty percent if undelivered and late responses are excluded). In short, the incompleteness of the returns raises, to survey researchers, the question of nonresponse as a source of bias, the magnitude and direction of which will never be known. For example, if two hundred questionnaires were sent out, and one hundred returned, and of those one hundred, sixty said "Yes" to a particular question and forty responded "No" to the same questions, we can say "sixty percent said 'Yes' ," but Survey researchers have to say either "sixty percent of those who responded said 'Yes'," or "sixty out of two hundred persons polled," or "only thirty percent, said 'Yes'." Thus, the overall validity of the survey as providing a true reading of even the "subjective" responses, is in great doubt.

6. The questions and alternative responses were highly subjective, and often speculative. The response alternatives reeked of personal guess-work and individual interpretation. In sum, there was a Constitutionally significant lack of objectivity in the question and answer alternatives.

7. Finally, one must question why the significant discrepancies in response categories for questions 4 and 15, dealing with the dignity of courtroom proceedings and respect for the court, were not pursued? And, why were the respondents not asked about the effects of the television

cameras on the accused or the likelihood of his receiving a "fair" trial? After all, wasn't that what the survey was all about?

The Florida Supreme Court made note of a second survey, not commissioned by it, in *Post-Newsweek, supra,* 370 So.2d at 767, n.6, 769-770. The Court noted that the Florida Conference of Circuit Judges (FCCJ) conducted its own survey, and further, the conference had taken a position in opposition to the proposed televised criminal trial rule. *Post-Newsweek, supra,* 370 So.2d at 770. In the very next breath, the Florida Supreme Court stated, ". . . the empirical data collected [by the Conference] . . . does not seem to support the formal position taken." *Id.*

In fact, the formal position taken by the Conference:

1. Made it quite clear that the State trial court judges were opposed to any change in Canon 3A(7),

2. Underscored the fact that in the experimental year, "with some exceptions the media has shown an interest only in a few sensational criminal cases in which defendants have been charged with notorious crimes," and further, that "only small portions of these cases have reached the viewing audience, more often only the video portion being shown, overlaid by the capsulized audio summary of the reporter," and

3. Concluded that, "[w]ith its selective closeup and editorial comment, it [television coverage] so far surpasses what some more [sic] persons may see and hear in the courtroom that it has an influencing effect both on the person being televised and those who see the recording of that person's image and voice. Unless the entire trial is evenly televised and

photographed, out-of-context emphasis and attention is drawn to selected witnesses and to those moments of high drama and excitement that only occasionally occur in a trial."[28] Hon. Harold R. Clark, Circuit Judge, Chairman, The Florida Conference of Circuit Judges, Report of the Florida Conference of Circuit Judges to the Florida Supreme Court, filed in *In re Post-Newsweek Stations, Florida, Inc.* (July 18, 1978).

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[28]Regretably, it is as if Judge Clark were gazing into a crystal ball. Massive civil disorder and rioting broke out in Miami, Florida, on Saturday, May 17, 1980, and lasted for several days. Sixteen people were killed, 436 people were injured, 1,267 people were arrested. The resultant property damage (at the time of this writing) came to 100 million dollars. While the riots were largely a result of economic and housing disparity problems in Miami's Black community, the one event which "lit the fuse" was the drama of seeing, on television, the acquittal of four white City of Miami Police Officers who had been charged with beating a black man to death. The now infamous "McDuffie" trial (named ironically for the black victim) had been moved from Miami to Tampa in order to assure the accuseds of their right to a fair and impartial trial. The trial lasted for six weeks. Television coverage of the trial in progress was broadcast back to the Miami area on the evening news on all four of Miami's commercial television stations. Only three to four minutes of each day's courtroom activities were shown, and then, only the most lurid and sensational aspects of the State's case. The televised acquittal stunned the Miami community. The broadcast media showed the defendants rejoicing in full view. Dean George Gerbner, (in an interview with Gannett News Services, published on May 21, 1980) regarding the causal relationship between televising the McDuffie trial and the riots in Miami, observed that, "It is a chilling example of what happens when television selects a trial to televise. Such coverage arouses the emotions of people who might not attend to the news otherwise. What happened in Miami is a very high price to pay for a very little gain. The only gain is spectacle."

The "empirical data" brushed aside by the Florida Supreme Court, as "unsupportive" of the Conference's conclusion and recommendations against the continuation of televised criminal trials included the following significant fact. Of the two hundred eighty-six Circuit Court (trial) Judges in the state, one hundred fifty-five, or fifty-four percent, responded to the Conference's televised trials questionnaire. Ninety-six of the one hundred fifty-five judges had had some experiences with broadcast media in their courtrooms or chambers. Other judges reported experiences with the broadcast media in areas of the courthouse other than their courtrooms or chambers. Twenty-nine of the judges responded that their reactions to broadcast media in relation to televised trials and court proceedings were negative. Thirty-six judges said their reactions were positive, while thirty-seven gave "neutral" responses. See Appendix to Report of the Florida Conference of Circuit Judges, *supra*.

Assuming that the information contained in the Conference Appendix was "empirical," Appellants contend that where twenty-nine of one hundred and two judges, or thirty-five percent of the responding State trial judges report negative reactions to broadcast media in courtrooms and chambers, and around the courthouse, the Florida Supreme Court has totally and callously misinterpreted the very "survey upon which it seeks to rely in an effort to justify the unconstitutional continuation of televised criminal trials."

### D. A Close Analysis of The Survey Establishes that there is a Constitutionally Significant Number of Witness and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment.

The Florida Supreme Court placed a great deal of reliance on the sample survey which its own Administrative Office conducted. *Post-Newsweek, supra,* 370 So.2d 767-769.[29] While not published as part of the *Post-Newsweek* decision *per se, The Survey,* raw data and appendices thereto were filed with the Florida Supreme Court and copies of same were made available to "interested" parties. Appellants, clearly interested, obtained a copy for analysis in this brief.

*The Survey* is a rhinestone, which fails to rise to the level of gem quality necessary before the noble sails of federally guaranteed Constitutional rights are trimmed. It is obvious that the Florida Supreme Court's misplaced reliance on what it clearly conceded to be a less than scientific study, *Post-Newsweek, supra,* 370 So.2d at 768, has literally emasculated Appellants' rights to due process of law.

The synopsis of *The Survey* and the historical evolution of the experimental program, by the Judicial Planning Coordination Unit (JPCU) of the Office of the State Court's Administrator (OSCA), accurately state that the proponent of the Rule, Post-Newsweek, was supported by various media groups and commercial broadcasting companies. The Florida Bar, Conference of Circuit Court Judges, and the Academy of the Florida Trial Lawyers Association, *inter alia,* opposed the experiment. *The Survey,* at pg. 2. This report also conceded that ". . . the ideal analysis, one which would incorporate an experimental design to measure the impact of the presence of the media and photographers in the courtroom was not feasible." *Id.* at pg. 5.

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[29]*A Sample Survey Involving Electronic Media and Still Photography Coverage in Florida Courts between July 5, 1977 and June 30, 1978;* prepared by the Judicial Planning Coordination Unit, Office of the State Courts Administration (hereinafter referred to as "The Survey"). *Post-Newsweek, supra,* 370 So.2d at 767, n.4.

Finally, in analyzing its own Survey, the JPCU observed:

> It should be noted that, as indicated above, the Court did not wish to perform an experiment regarding the impact of the presence of electronic media and still photography coverage in the courtroom. Nor, could it have done so under the circumstances of the pilot program.
>
> An experiment encompasses the isolation and testing of a new event upon a particular situation. It requires that the experimenter compare all aspects of the situation, both prior to and after the occurrence of the event, or through control groups, similar situations where the event occurred and did not occur.
>
> This survey of selected trial participants cannot be considered an experiment. No attempt was made to determine the reactions of participants of trials which did not involve media coverage. The information which is contained in this document must be reviewed with this thought in mind to ensure that erroneous interpretations or invalid applications of the data do not result. *The Survey,* at pg. 6.

According to the JPCU's synopsis, *The Survey,* was *designed* and implemented by two members of its own OSCA staff (whose expertise and qualifications in this sensitive area are nowhere described). "Technical assistance" was provided by three other staff members (whose *curricula vitae* are likewise omitted). And, as the Court itself noted, *Post-Newsweek, supra,* 370 So.2d at 767, n.5, Dr. Pauline Holden, University of Florida Criminal Justice Program, "served in a consultative capacity for reviewing the questionnaire format." *The Survey* Synopsis, *supra,* at pg. 7. Appellants

contend that the Florida Bar's suggestion that qualified social scientists from the Florida State University System (AB. 11-13), if followed, would have more likely provided a "truer" reading of the experiment than the above-described individuals, whose qualifications, background and experience in the matters at hand are totally unknown and unreported (officially, at least).[30]

The lack of professional expertise in designing and implementing *The Survey* is underscored by the JPCU's explanation as to why *The Survey* relied on attorneys, as a group, rather than behavioral specialists (such as psychiatrists, pyschologists and social scientists) to assess "the behavior of jurors, witnesses and judges in the courtroom when media was present." *The Survey,* at pg. 8. According to the synopsis, "since . . . [attorneys have] been involved in more than one court situation, it was felt that their answers would be more valid concerning certain behavior than individuals who had only been involved with one trial." *Id.* Whatever else lawyers may be, competent or otherwise, they are engaged in an adversary system and have subjective feelings about witnesses, judges and jurors, which frequently depend upon the outcome of their particular case. Trial lawyers are not professionally trained to make the kind of objective judgment necessary to a meaningful "scientific" study. Thus, the authors of that particular aspect of *The Survey* arrived at a conclusion which may not necessarily have been reasonably, or rationally, derived from the underlying hypothesis.

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[30]Appellants do not mean to suggest than even highly qualified social scientists could have designed or implemented a meaningful test or survey (see Point IV - C, *supra*), but, having set out on this pilot program, it would have been far better to have utilized the resources of recognized experts rather than unknown novices, especially when one considers the dimensions of the Constitutional problem at stake. After all, the Federal Aviation Administration clearly would not permit a student pilot to fly a 747 Jumbo Jet.

The contents of *The Survey* itself, as reported in *Post-Newsweek, supra,* 370 So.2d 767-770, are likewise susceptible to a chameleon-like quality, depending on who is doing the interpreting. For example, the Florida Supreme Court stated, "More than 2,750 persons participated as judge, attorney, court attache, juror or witness, in trials covered by the electronic media during the experimental period." *Id.* at 767 [footnote omitted]. Yet, only 2,660 survey questionnaires were sent out by OSCA, and only 1,349 were returned in time to be used in *The Survey*. *Id.* at 768 and *The Survey, supra,* Appendix.

Significantly, only 44% of all witnesses who received questionnaires returned them in time; 65% of the attorneys and jurors were timely, and 72% of the court personnel[31] (probably the least important group of respondents in terms of the constitutional impact of media broadcasting) responses were seasonal. *Id.* Thus, one of the groups on which the effects of media broadcasting (witnesses) is critical had the lowest percentage of return rate and the constitutionally least important group had a tremendously greater response. No apparent effort was made to "grade" or "weigh" groups according to the role they "played" at trial. Thus, we see, from the very start, the wisdom of the Eighteenth Century British Statesman, George Canning, who remarked, "Statistics — I can prove anything by statistics — except the truth!"

The Florida Supreme Court's opinion studiously avoids a rather telling statistic obtained from attorneys who were surveyed. In the "Attorney — Biographical Data" portion of *The Survey* synopsis, *supra* at 22, the respondent attorneys were asked:

[31] i.e., bailiffs, court clerks and court reporters

In general, your feelings about your court service *prior* to allowing cameras in the court were:

| | | |
|---|---|---|
| 1. | Very Favorable | 59.1% |
| 2. | Favorable | 37.4% |
| 3. | Undecided | 2.6% |
| 4. | Unfavorable | .9% |
| 5. | Very Unfavorable | 0% |

In general, your feelings about your court service *where cameras,* photographers and related equipment *were present were:*

| | | |
|---|---|---|
| 1. | Very favorable | 39.7% |
| 2. | Favorable | 28.9% |
| 3. | Undecided | 10.7% |
| 4. | Unfavorable | 10.7% |
| 5. | Very Unfavorable | 9.9% |

[emphasis added].

Appellants are mystified as to how the Florida Supreme Court could so cavalierly ignore the overwhelming increase in the adverse reactions of the Bar's trial attorneys, from less than 1% to 20.6%.

Even if the Court determines that *The Survey* was validly and scientifically conducted, Appellants' analysis of *The Survey* challenges the very integrity of the Florida Supreme Court's reliance upon, and the conclusions drawn, from specific Survey questions. Appellants contend that the sixteen "general indications," *Post-Newsweek, supra,* 370 So.2d at 768-769, to which the Florida Supreme Court so proudly points as indicia of the lack of Constitutional error, on closer and more careful examination, actually support the proposition that a Constitutionally significant statistical response indicates that electronic media and still

photographic presence during a trial in progress denies the accused a fair and impartial trial and due process of law.[32]

The Florida Supreme Court concluded, *Post-Newsweek, supra,* 370 So.2d at 768, [Footnote omitted]:

> (1) Presence of the electronic media in the courtroom had *little* effect upon the respondents' perception of the judiciary or of the dignity of the proceedings.

An analysis of Question 4 of *The Survey* shows jurors and witnesses felt a 14.7% and 27.3% *decrease,* respectively, in their perception of "courtroom dignity;" likewise, Question 15 produced an 8.4% and 16.5% decrease in jurors' and witnesses' "respect for the courts." Those percentages are hardly "little."

The Court then went on to state, *Post-Newsweek, supra,* 370 So.2d at 768, [Footnote omitted]:

> (2) It was felt that the presence of electronic media disrupted the trial either not at all or only slightly.

In fact, in response to Survey Question 5, "[t]o what extent did the presence of television, photographic or radio coverage in the courtroom disrupt the trial?", 22.4% of the jurors and 43.1% of the witnesses responded that broadcast media disrupted the proceedings either "slightly," "moderately," "very" or "extremely."

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[32]This Court has not hesitated in the past to apply statistical evidence in arriving at judgments which have held that defendants have been denied equal protection of the law. *See, for example, Alexander v. Louisiana,* 405 U.S. 625 (1972); *Castaneda v. Partida,* 430 U.S. 482 (1977); *See also* Baldus and Cole, *Statistical Proof of Discrimination,* (1980).

Next the Florida Supreme Court concluded, *Post-Newsweek, supra,* 370 So.2d at 768 [Footnote omitted]:

> (3) Respondents' awareness of the presence of electronic media averaged between slightly and moderately.

But, only 19.5% of the jurors and only 20% of the witnesses responded that they were "not at all" aware of electronic media's presence. *The Survey,* Question 6. Are not Appellants Constitutionally entitled to *no disruption* by the "awareness" caused by the presence of broadcast media?

The Florida Supreme Court then stated, *Post-Newsweek, supra,* 370 So.2d at 768 [Footnote omitted] that:

> (4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected.

Actually, 3.8% of the jurors responded that electronic media presence either "slightly" or "greatly" hindered their "ability to judge the truthfulness of the witness." *The Questions 7 and 15.* 15.5% of the respondent jurors admitted that broadcast media's presence affected their ability to "concentrate on the testimony." *The Survey,* Question 8.

Our system of justice was designed to prevent jurors from arriving at decisions affected in some way by "outside" influences. To the accused, and as Appellants contend, to this Court, a 3.8% hindrance factor *is* constitutionally significant. A 15.5% disruption in a jury's ability to concentrate on a witnesses' testimony clearly rises to the level of a due process violation.

The Florida Supreme Court's next observation was, *Post-Newsweek, supra,* 370 So.2d at 768 [footnote omitted], that:

> (5) All respondents were made to feel slightly self-conscious by the presence of electronic media.

Even this conclusion is inconsistent with the data in *The Survey.* For example, 3.5% of all jurors, and 6.6% of all witnesses responded that they were "extremely" self-conscious as a result of broadcast media's presence. *The Survey,* Question 9.

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 768 [footnote omitted], that:

> (6) Both jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions.

Once again, the Florida Supreme Court has misread the significance of that particular survey question. Proponents of the televised criminal trial rule have long and loudly proclaimed that broadcasting, (live and in full color), criminal trials in progress will make the jurors and witnesses more responsible for their actions and conduct. In fact, that, along with the "educational carrot" dangled in front of the Florida Supreme Court, has been media's most publicly vocal argument. Yet the response to *Survey* Question 10 makes clear that 76% of the jurors and 61.2% of the witnesses were not made to feel responsible at all by the presence of television, photographic or radio coverage.

Next, the Florida Supreme Court found, *Post-Newsweek, supra,* 370 So.2d at Page 768 [footnote omitted], that:

(7) Presence of electronic media made all respondents feel *only slightly nervous* or more attentive. [emphasis added].

Appellants have difficulty reconciling the above statement with the realities of *The Survey* responses. It is almost as if the Florida Supreme Court had a different set of responses and compiled data than that supplied by the OSCA to the undersigned and the public. In fact, 25.3% of all jurors and 46.7% of all witnesses who responded to *The Survey* admitted to degrees of nervousness as a result of the presence of broadcast media, ranging between "slightly," "moderately," "very" and "extremely." And, only 19.8% of all jurors and 35.8% of all witnesses who responded (not all, as the Florida Supreme Court stated) reported they were either "slightly," "moderately," "very" or "extremely" more attentive as a result of television's presence. *The Survey, supra,* Question 11 and 12.

One might argue that making witnesses and jurors "more attentive" is a positive feature of "Cyclops' " presence. But, when we begin to impose novel amendments to time honored systems, we first ought to be certain that individual rights are not swept away by the sea of "change for change's sake."

The Florida Supreme Court next concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] that:

(8) The distracting effect of electronic media was deemed to range from *almost not at all* for jurors, *to slightly* for witnesses and attorneys. [emphasis added].

Once again, this statement is misleading. *The fact of the matter is that 23.1% of the jurors and 39.4% of the witnesses*

*admitted that the presence of broadcast media during the trial distracted* them. *The Survey,* Question 13.

Are not those two figures Constitutionally significant?

The next conclusion by the Florida Supreme Court, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] was that:

> (9) The degree to which jurors and witnesses felt the urge to see or hear themselves on the media fell between not at all and slightly.

In *Estes v. Texas, supra,* Mr. Justice Clark, without the benefit of a crystal ball, stated that absent juror sequestration, ". . . jurors would return home and turn on the TV if only to see how they appeared upon it." *Id.,* 381 U.S. at Page 544. Mr. Justice Clark's statement even presumes the trial judge would admonish the jurors not to do just that. *Sub judice, The Survey response established, contrary to the Florida Supreme Court's statement, that 27.7% of the jurors and 37.4% of the witnesses admitted they had an urge to see or hear themselves on the media, The Survey,* Question 14.[33]

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] that:

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[33]In the highly publicized Dade County, Florida, televised first degree murder trial of *Ron Zamora,* the jury was sequestered. Television sets were removed from their hotel rooms and they were instructed by the judge not to watch television. During the second week of trial, the foreman of the jury requested that the jury be ". . . allowed to watch themselves on television with the sound turned off, just to see what [they] look[ed] like." (AB 15) The trial judge properly denied the request. *Id.* But, a star was born . . . . twelve of them!

(10) *Presence of electronic media* affected the different participants' sense of the importance of the case in varying degrees. *Jurors felt that it made the case more important to a slight degree; witnesses to a degree between slightly and moderately;* court personnel slightly; and *attorneys moderately.*

*The Survey,* Question 16, reflects that *48% of the jurors and 58% of the witnesses* felt the "presence of television, photographic or radio coverage in the courtroom during the trial made the case *more important." Id.* Does it make any difference at all, as a matter of due process of law, whether the responses to that question were "slightly," "moderately," "very" or "extremely?" Of course not! The percentages speak for themselves. "Matters of degree" are really quite beside the point. Would the FDA permit the continued sale of a drug where, after research, it found that__% of those using the drug became "slightly" ill,__% became "extremely" ill, and *only*__% died?

The next conclusion of the Florida Supreme Court, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], was that:

(11) To a degree between not at all and slightly, *jurors perceived that the presence of electronic media in the courtroom during the testimony of a witness made that witness's testimony more important.*

Forgetting about "degrees," the fact of the matter is that *26.5% of the jurors felt that the presence of a television camera during the testimony of a witness made that witness' testimony "more important." The Survey,* Question 17.

By implication, this means, as occurred *sub judice,* the portion of the witness' testimony which is televised is "more important" than the portion which is not in the "spot-light," at least to 26.5% of the jury. *Sub judice* the television camera was present during John Sion's testimony on direct

examination. (R.374) No cameras were present on cross-examination, nor was there a camera present during presentation of defense testimony. Therefore, we may conclude from the study that slightly more than one-fourth of the trial jury below "felt" the televised testimony was "more important." Is that due process of law?

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], that:

> (12) There was no significant difference in the participants' concern over being harmed as a result of their appearance on electronic media broadcast (including still photography) as opposed to their names appearing in the print media. In each instance the concern ranged on the scale between not at all and slightly.

While there might not have been any "significant difference" as stated by the Florida Supreme Court above, 39.6% of the jurors and 29% of the witnesses expressed some degree of concern over being televised in the context of this particular question. *The Survey,* Question 19. 39.1% of the jurors and 29.4% of the witnesses expressed some degree of concern over being photographed (by newspapers), *Id.,* at Question 20; 36.1% of the jurors and 28.1% of the witnesses expressed varying degrees of concern about "being in the newspapers,"[34] *Id.,* at Question 21; and, by comparison, only 23.6% of the jurors and 21.1% of the witnesses expressed concern over their participation being on radio. *Id.,* at Question 22.

Perhaps, then, it is true that "a picture is worth a thousand words!"

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[34]A better question would have been what degree of concern, if any, would the witnesses and jurors have if just their name, without a picture, appeared in the newspaper. A trained researcher would have seen the significance of that question.

The Florida Supreme Court next concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], that:

> (13) Jurors and witnesses manifested the same attitude concerning the possibility that persons would attempt to influence their decision or testimony. There was no discernible difference in the height of their concern as between electronic and print media; the average response was slightly on the lower end of the spectrum between not at all and slightly.

The juror response about varying degrees of concern with respect to "attempts to influence" as a result of:

| | | |
|---|---|---|
| (a) | being on television was | 19.1% |
| (b) | being photographed was | 15.8% |
| (c) | radio coverage was | 11.8% |
| (d) | newspaper coverage was | 14.4% |

*The Survey,* Questions 23a, 24a, 25a and 26a.

Witness responses to the same question were as follows:

| | | |
|---|---|---|
| (a) | being on television was | 17.5% |
| (b) | being photographed was | 16.1% |
| (c) | radio coverage was | 14.0% |
| (d) | newspaper coverage was | 16.4% |

*The Survey,* Questions 23b, 24b, 25b and 26b.

Insofar as "flamboyancy" of attorneys and witnesses is concerned, the Florida Supreme Court's findings are, Appellants contend, relatively inconsequential in terms of the Constitutional issue, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted]:

> (14) Court personnel and attorneys perceived that the presence of electronic media made the participating attorneys' actions more flamboyant only to a slight extent.
>
> (15) Court personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly.

After all, what well prepared, competent, skilled trial attorney does not yearn for that moment in his career when he can step into "Clarence Darrow's shoes" and with just the right word, just the right phrase, just the correct gesture and intonation, "snatch victory from the jaws of defeat!" And, a well-prepared, well-trained, skilled trial lawyer should have little difficulty dealing with the "flamboyant" witness who comes to court with his "make-up bag and blue shirt."

The Florida Supreme Court's broad statement, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], however, that attorneys:

> [(16)] . . . also felt that the witnesses were slightly inhibited by the presence of electronic media and that jurors were made slightly self-conscious, nervous, and distracted, but also slightly more attentive,

oversimplifies the problem.

In the first place, for whatever value the attorneys' judgment of the witness' condition and attitude, the following were the attorneys' Survey responses to the question, "Did the presence of television, photographic or radio coverage in the courtroom",

(1) "make the witness more self-conscious?"

75.9% of the attorneys said, "yes" in one degree or another. *The Survey,* §II, Appendix 3, Question 1.

(2) "make the witness more cooperative?"

83.2% said "not at all." *Id.,* Question 2.

(3) "make the witness more nervous?"

75.2% of the attorneys said "yes" in one degree or another. *Id.,* Question 3.

(4) "make the witness more attentive?"

64.7% of the attorneys said "no." *Id.,* Question 4.

(5) "distract the witness?"

62.8% said "yes" in one degree or another. *Id.,* Question 6.

(6) "inhibit the witness?"

56% said television did inhibit the witness to one degree or another. *Id.,* Question 7.

The Florida Supreme Court overlooked certain other aspects of the study, which Appellants contend support their claim of denial of due process of law. For example, the following responses were elicited with respect to the following *Survey, supra,* questions:

(1) "Was the presence of the equipment distracting to you personally?" *The Survey, supra,* Question 33.

11% of the jurors said yes, as did 21% of the witnesses and 41.9% of the attorneys.

While media proponents may claim modern technology reduces "distraction," *The Survey* responses seem to indicate to the contrary.

(2) "To what extent did the presence of television, photographic or radio coverage in the courtroom make you [the respondent attorney] nervous?" *Id.*, §II. A.2., Question 4c.

40% of the respondent attorneys indicated that they were nervous to some degree, ranging from "extremely" (2%) to "slightly" (26.7%). Right to counsel, guaranteed by the Sixth Amendment to the United States Constitution, carries with it right to effective counsel. Where 40% of the attorneys engaged in trials expressed some degree of nervousness by virtue of the presence of television, photographic or radio coverage in the courtroom, one must be concerned, seriously, with the question of effective representation of counsel.

(3) "To what extent did the presence of television, photographic or radio coverage in the courtroom distract you [the respondent attorney]?" *Id.*, at Question 6.

59.3% of the attorneys expressed that they were distracted to one degree or another.

(4) "To what extent did the presence of television, photographic or radio coverage in the courtroom distract the judge?" *Id.*, §III. A.2, Question 12.

42.4% of the respondent attorneys indicated that in their view the presence of television, photographic or radio coverage in the courtroom "distracted" the judge. Where one's life, liberty or property is at stake, due process of law compels an attentive judge free from "outside influence." No matter how well prepared the Trial Court and the litigants' attorneys may be, in virtually every trial there are exigencies which cannot be anticipated, questions asked or answers given, which require immediate action by either the attorney (in the nature of an objection) or the Court. As a result of this broadcast media "happening," trial judges must now be not only diligent to the normal activities and events which transpire in every trial, keep notes for appropriate rulings on motions, objections and the like, but in addition, suffer the "distraction" that a significant number of attorneys perceived to exist during their trials as indicated in *The Survey*.

These then are the cold facts. The prominent early Twentieth Century English manufacturer, Sir Harold Bowden, said, "Facts that are not frankly faced have a habit of stabbing us in the back!" While the Florida Supreme Court may have been well-intentioned in the commission of *The Survey*, the foundation on which it was built was quicksand, not concrete.

### E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye.

"The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned." 2 *Cooley's Constitutional Limitation* 931 (Carrington ed. 1927). While ordinarily this Court has required, in most cases involving claims of due process of law violations, a showing of identifiable prejudice to the accused, exceptions have been carved to that Rule where, ". . . a procedure employed by the State involves

such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes, supra,* 381 U.S. 542-543. This Court has followed that rule in *Rideau, supra; Turner v. State of Louisiana,* 379 U.S. 866 (1965); and, in somewhat slightly different context, *Gideon v. Wainwright,* 372 U.S. 335 (1963) and *White v. State of Maryland,* 373 U.S. 59 (1963). *Estes, supra,* at Page 544.

As demonstrated by the very study which Florida seeks to rely on to sustain the electronic media experiment, "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Id.* And, the Court ought not require the Appellants to go beyond that rule today. The Court did not recede from that basic proposition in *Shepperd v. Maxwell, supra,* nor ought it now. To permit the media to continue to "wag" the State Court's "tail" on the grounds of their spurious claim of a "superior right to access" would allow our courts to violate the Sixth and Fourteenth Amendments with impunity, safe in the knowledge that state courts could wash their hands at the alter of the First Amendment in a manner not consistent with due process of law.

## CONCLUSION

Television is like the "Devil's Hook" — so tempting, yet so very dangerous. Why even nibble at media's bait? The day of the printed word is far from ended. Although a radio bulletin may swiftly deliver a message, and even though "eye-witness" television news may be graphic, yet content, context, clarity and meaning must be added. Even if the electronic media had a Constitutional right to televise a trial in progress, people simply cannot absorb meanings at the speed of light. Continuation of televised criminal trials will destroy the intent and purpose of the Sixth and Fourteenth Amendments.

The televising of a criminal trial in progress does not contribute one iota to the fact-finding process, to the "search for the truth." The mere presence of television cameras is, subconsciously distracting to, and disruptive of, the trial process itself. The English journalist, C. P. Scott, is reported to have said, "Television? The word is half Latin and half Greek. No good can come of it." Televising criminal trials has not promoted the ends of justice, nor has it truly "educated" the public. Why then, should this experiment in electronic justice continue? As stated by Lord Denman, while addressing the House of Lords in the case of *O'Connell v. Queen,* (1844), "If such a practice [improper jury selection] should be allowed to pass without a remedy . . . trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare." 1 Cox, *Reports of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland,* 519 (1846).

The Appellants' Constitutional Rights to a fair and impartial trial, and to due process of law are clearly superior to the broadcast media's unsupported claim that the presence of television cameras in a criminal trial will enable the public "to know" what is happening in our courtrooms.

Media access is not without limitations. This is so because, as Napoleon is reputed to have said, "A journalist is a grumbler, a censurer, a giver of advice, a regent of sovereigns, a tutor of nations. Four hostile newspapers are more to be feared than a thousand bayonnets."

"Due process of law requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communication and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused." *Shepperd v. Maxwell, supra,* 384 U.S. at 362. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

"The 'double feature' has ended. The show is over; [Appellants contend] the verdict is in: [electronic media is] guilty," *Rhodes v. State,* 283 So. 2d 351, 359 (Fla. 1973), of violating the Sixth and Fourteenth Amendments by its insistence upon televising criminal trials in progress over the accuseds' objection. The judgment below should be reversed.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320

By: Joel Hirschhorn,
*Attorney for Appellants*
*Chandler and Granger*

# APPENDIX

## APPENDIX TO BRIEF

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IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

**CASE NO.: 77-5070**

STATE OF FLORIDA,

*Plaintiff,*

*-vs-*

ROBERT GRANGER AND NOEL CHANDLER,

*Defendants.*

---

ORDER CERTIFYING QUESTION TO FLORIDA SUPREME COURT PURSUANT TO RULE 4.6 F.A.R.

STATEMENT OF FACTS

Defendants, City of Miami Beach Police Officers, have been informed against by the Dade County State Attorney's Office in the above-styled cause and charged with Conspiracy, Burglary, Grand Larceny, and Possession of Burglary Tools. The Defendants' arrest and arraignment have been reported in media within Dade County, Florida.

Defendants, through counsel, have filed their motion to declare Florida's experimental Rule 3A(7) unconstitutional as written and as applied, attacking this Court's order modifying the Canons of Judicial Ethics found in 32 FSA Pocket Part and Rule 3.110 as set forth with more particularity in the Florida Supreme Court's Opinion of June 17, 1977, in the case styled *In Re: Petition of Post-Newsweek Station,* ____ So.2d ____ (1977).

While the granting of [sic] denying of Defendants' motion, (a copy of which is attached hereto as Exhibit 1), [Exhibit 1 is omitted as it is set forth in full in A. 3-4 and R. 1117-1118] will not necessarily be dispositive of the case against the Defendants, the motion does raise, in this Court's opinion, a question or proposition of law which is without controlling precedent in this State. The undersigned judge believes that instruction from this Court will facilitate the proper disposition of Defendants' motion and presumably thereby eliminate the possibility of reversible error should there be a conviction in this case.

QUESTION OF LAW TO BE ANSWERED

WHETHER, NOTWITHSTANDING THIS COURT'S DECISION *IN RE: PETITION OF POST-NEWSWEEK STATIONS,* ____ So. 2d ____ CASE NO. 46,835, DECIDED JUNE 17, 1977, A CRIMINAL TRIAL MAY BE TELEVISED OVER THE OBJECTION OF THE DEFENDANT, IN THE LIGHT OF ESTES v. TEXAS, 381 U.S. 532 (1965).

DONE AND ORDERED at Miami, Dade County, Florida, this 27th day of July, 1977.

/S/
ALAN R. SCHWARTZ
DADE COUNTY CIRCUIT COURT
JUDGE

(Certificate of Service Omitted)

* * * * *

(Title of Case and filing
information Omitted)

ORDER DENYING RENEWED MOTION
CHALLENGING
CONSTITUTIONALITY OF CANON 3A(7)

THIS CAUSE having come on to be heard before me upon Defendants' Renewed Motion for Order Challenging the Constitutionality of Experimental Canon 3A(7) and seeking an Order precluding live coverage of the Defendants' trial, and the Court having considered said Motion and being otherwise fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that said Motion be and the same is hereby DENIED.

DONE and ORDERED in Open Court at Miami, Dade County, Florida, this 31st day of October, 1977.

_____
CIRCUIT COURT JUDGE

(Certificate of Service
and Clerk's Certification of
True Copy Omitted)

[Please note that this Order is in the Original Record, unnumbered, but should be found at R. 1126]

**National Center for State Courts**
**300 Newport Avenue**
**Williamsburg, Virginia 23185**
**(804) 253-2000**

**Edward B. McConnell**
**Director**

# RULES CONCERNING TELEVISION, RADIO AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

## SUMMARY TABLE

## A. STATES THAT PERMIT COVERAGE ON PERMANENT BASIS

| State | Authority and Nature of Coverage | Effective Date |
|---|---|---|
| 1. Alabama | Supreme Court authorizes and approves coverage plan. Consent of parties required. | Feb. 1, 1976 |
| 2. Alaska | Supreme Court ruled in favor of permitting coverage of trial and appellate courts on a permanent basis. Consent of parties is required. A one-year pilot program concluded September 1979. | Nov. 1, 1979 |
| 3. Colorado | Judicial Canons permit coverage (first state to allow.) Consent of the accused, witness, juror and judge required. | Feb. 27, 1956 |
| 4. Florida | Supreme Court ruled in favor of allowing cameras and recording equipment on permanent basis. A one-year experiment completed June 30, 1978 and its evaluation preceded the Court's unanimous | May 1, 1979 |

| | | |
|---|---|---|
| | decision on April 12. Presiding judge can prohibit coverage for cause. No consent required. | |
| 5. Georgia | Supreme Court authorizes and approves coverage Plan. All plans require prior consent. | May 12, 1977 |
| 6. New Hampshire | Supreme Court authorized coverage of its proceedings. Supreme Court also approved a Superior Court resolution to allow trial coverage with the permission of the judge. No consent required. | Jan. 1, 1978 |
| 7. Tennessee | Supreme Court rules permit coverage on a permanent basis. Each plan must be approved by trial court and the Supreme Court. Consent required. Parties, jurors and witnesses can bar their individual coverage. Experimental coverage of proceedings in the Supreme Court lasted from May 26, 1978, to February 1979. | Feb. 27, 1979 |
| 8. Texas | Supreme Court authorized coverage of appellate proceedings. | Nov. 9, 1976 |
| 9. Washington | Supreme Court approved rule allowing coverage. If witnesses and jurors express prior objection, no telecast or photographs allowed. Test was authorized and conducted in 1974. | Sept. 20, 1976 |
| 10. Wisconsin | Supreme Court rules permit coverage on a permanent basis. Consent is not required except for coverage of individual jurors. A one-year experiment was completed on March 31, 1979. | July 1, 1979 |

## B. STATES THAT PERMIT COVERAGE ON EXPERIMENTAL BASIS

| State | Authority and Nature of Coverage | Effective Date |
|---|---|---|
| 1. Arizona | Supreme Court authorized one-year experimental coverage of appellate proceedings. | May 31, 1979 |
| 2. California | Judicial Council approved one-year experimental coverage. Approval of the judge is required. Consent of the defendants is needed. A separate evaluation of the experiment will be conducted. [It is significant to note that California modified its rule to require the defendant's consent after this Court noted probable jurisdiction in this case.] | June 1, 1980 |
| 3. Idaho | Supreme Court authorized seven-month experiment in coverage of its proceedings has been extended for an indefinite period in Boise. Rules now permit one-year experimental coverage in locations outside of Boise. | Dec. 4, 1978 |
| 4. Iowa | Supreme Court approved one-year experimental coverage of trial and appellate proceedings at the discretion of the judge. No consent is required. | Jan. 1, 1980 |
| 5. Louisiana | Supreme Court authorized a one-year pilot program in Division B of the Ninth Judicial District Court. The experiment was extended. Consent is required. | Feb. 23, 1978 |

## B. STATES THAT PERMIT COVERAGE ON EXPERIMENTAL BASIS (continued)

| | | |
|---|---|---|
| 6. Mass. | Supreme Judicial Court allowed one-year experimental program in appellate and trial courts. Consent is not required. | April 1, 1980 |
| 7. Minnesota | Supreme Court authorized experimental coverage in the Supreme Court. Test period not specified. | Jan. 27, 1978 |
| 8. Montana | Supreme Court suspended the ban for a two-year experimental period. Consent was not required. Survey is being conducted to evaluate the experiment. | April 1, 1978 |
| 9. Nevada | Supreme Court authorized one-year coverage on an experimental basis. Consent of the parties is not required. | April 7, 1980 |
| 10. New Mexico | Supreme Court approved televising of appellate and trial court proceedings. Rules and guidelines are to be finalized. Effective date has not been determined. | |
| 11. New Jersey | Supreme Court approved experimental coverage for one-year or until at least six trial-court cases have been covered. No consent required. | May 1, 1979 |
| 12. North Dakota | Supreme Court authorized one-year experimental coverage of its proceedings. The experiment has been extended to July 1, 1980. | Feb. 1, 1979 |
| 13. Ohio | Supreme Court authorized one-year experimental coverage of trial and appellate proceedings. Consent not required. | June 1, 1979 |

| | | |
|---|---|---|
| 14. Oklahoma | Supreme Court authorized one-year experiment has been extended for another year. If prior objection is expressed, telecast or photographs not allowed. | Jan. 1, 1979 |
| 15. Pennsylvania | Supreme Court authorized one-year experimental program to allow coverage of non-jury civil trial proceedings, if the trial judge permits. Consent is not required. If a party or witness expresses prior objection judge can disallow coverage. | Oct. 1, 1979 |
| 16. West Virginia | Supreme Court approved a six-month experiment in Mononhagela County Circuit Court (Morgantown). Consent was not required. Report of the experiment is expected. | Jan. 22, 1979 |

## C. STATES ACTIVELY CONSIDERING ALLOWING COVERAGE

**Arkansas, Connecticut, Michigan, Mississippi, Nebraska, New York, Rhode Island, Utah, and Vermont.**

## D. Legislative Developments in the States

1. Louisiana: Revised Section 4164 of Title 13 of the Louisiana Revised Statutes, in part, reads "no proceeding in any court within this state shall be televised or recorded by television equipment." Recording of proceedings is allowed in "accordance with the terms of a motion and stipulation agreed to by all parties to the proceeding and approved by the judge hearing the matter."

2. Maine: Recently passed statute requires that all pretrial criminal proceedings be open to the general public unless the court finds a substantial reason to disallow. (15 MRSA Section 457).

*"For heaven's sake, man, look ashamed. We're being televised."*

• •

Drawing by Levin; © 1979
The New Yorker Magazine, Inc.

THE FLORIDA BAR

Legal Affairs

Tallahassee, Florida 32304
Telephone (904) 222-5286

February 6, 1976

Honorable B.K. Roberts
Chief Justice, Supreme Court
of Florida
Supreme Court Building
Tallahassee, Florida 32304

Re: Petition of Post-Newsweek Stations, Florida, Inc. For Change in Code of Judicial Conduct.

Dear Justice Roberts:

I write this to you as the Court's senior Justice. As such, you have been designated Conferee in charge of the Post-Newsweek Petition. The purpose of this letter is to suggest an approach to this matter that, if adopted, will allow the Court to have the benefit of objective scientific analysis unclouded by the advocacy of any of the proponents or opponents of cameras in the courtroom.

The Bar's basic objections are unchanged. However, as the Court has allowed two exemptions to be made to Canon 3A(7), we feel duty-bound to assist the Court in the experiment. Toward this end I propose that qualified research scientists from the Florida State University School of Social Science be authorized to conduct research and measuring tests before, during and after the trials. These

tests would, of course, be subject to Judge Willis' overall control.

When the results of the tests are in, the Court can have the advantage of scientifically measured responses from all participants. This will be particularly valuable in the Court's determination on the importance of the stress factor, embarrassment if any, anxiety, "ham actor" tendencies and other factors not well measured by the profession nor the industry.

In the hope that you will look with favor upon this attempt to come up with measurable scientific data, I have contacted Dr. Kent Miller and Dr. Jack Brigham. Dr. Miller is with the Institute of Social Research and Dr. Brigham with the Department of Psychology at FSU. They think well of the project and are willing to work on this experiment as established by the Court. They have access to the full University's facilities including help from qualified graduate students. They feel, and I agree, that to do a competent job they would need the Court's blessing.

Specifically: 1) they need to clear in advance, procedures to maximize their ability to obtain an unbiased and objective evaluation of the effects of cameras and electronic equipment on the proceedings and, 2) they will need assistance in the research design wherein all the parties involved in direct observation of the proceedings are involved and access to the records and tapes from the proceedings.

If this research is permitted by the Court, it may go far in getting us measurable proof of what counsel only speculate upon in their advocacy. The Court, of course, would not be bound by their findings. No matter how interesting they may prove to be, such a small sampling could not be considered scientific proof of any final proposition, but it would be enlightening, have weight and give this project the scholarly approach of disciplines outside of the legal system.

If the Conference Committee, Judge Willis or counsel of the case feel this should be put in the form of a formal motion, that will be done. I use the device of this letter only to avoid formalities and because time will be a factor in setting up the project if approved.

Thank you for your consideration.

Respectfully,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

RCM:jg

cc: Justice Alan C. Sunberg

NOTE: Please see attached list of recipients of carbon copy.

(List of recipients of copy of letter omitted)

---

UNIVERSITY OF MIAMI
CORAL GABLES, FLORIDA 33124

SCHOOL OF EDUCATION
P.O. BOX 248065

May 27, 1979

Mr. Joel Hirschhorn
Hirschhorn & Freeman
742 N.W. 12th Avenue
Miami, Fla. 33136

Dear Mr. Hirschhorn:

Thank you for your letter of May 21 regarding your temporary postponement of your suit against cameras in the

courtroom. Enclosed is a bill for $665.70 to cover services and expenses in the analysis of the OSCA and the UCF research reports.

I made a thorough review of every aspect of the two studies and found a sufficient number of departures from minimal research requirements to suggest the need for considerable caution in the interpretation of their results. On the other hand, the UCF study — which is the better of the two, although certainly not free from "bugs" — does lend support to your position in "challenging the advisability. . . ." of using cameras in the courtroom. The data of the OSCA study, although not synthesized into a formal conclusion, would probably also support your position. I would be glad to go over my analysis with you at your convenience.

I enjoyed working on the project. It took me out of the usual "behavioral" research format. Although I have taught (statistics to) graduate students in criminal justice, this was my first look at what is obviously a most significant problem in the nation's justice system. I look forward to continuing with the project when you resume operations.

Cordially,

/s/ George J. Mouly
George J. Mouly.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

**NO. 77-25123A**

THE STATE OF FLORIDA,

*Plaintiff,*

*-vs-*

RONNEY A. ZAMORA,

*Defendant.*

EXCERPT OF PROCEEDING, OCTOBER 4, 1977

* * * * *

THE COURT: You may be seated. Ladies and gentlemen, at this time, we're going to recess for the day. I'm not going to hold you back there any longer.

Let me say that I have received the request of the jury that they be allowed to watch themselves on television with the sound turned off, just to see what you look like.

I can't permit that during the course of the trial, but I will arrange for it after the trial. You will all get to see yourselves on television.

With that assurance from the Court, have a pleasant evening. Court will reconvene at 10:00 a.m. Court stands in recess.

WHR INVESTIGATIONS, INC.
1600 N.W. North River Drive • Suite 100
Miami, Florida 33125 • (305) 324-6982

William H. Riley

Mailing Address:
P.O. Box 160868
Miami, Florida 33116

WHR #80-296

April 29, 1980

Mr. Joel Hirschhorn
742 Northwest 12 Avenue
Miami, Florida

Dear Joel:

On April 24, 1980, at your request, at the conclusion of the trial for the day in the State of Florida vs. Johnny L. Jones being heard before Judge Thomas Scott I took an incident-light meter reading.

The reading was taken from inside the jury box prior to the lights being turned off in the Courtroom.

The light reading at this time was 730 foot candles.

A reading was then taken from inside the jury box inside of Judge Gordon's Courtroom. The lights were on in the courtroom. The light reading was 260 foot candles.

This is an approximate ratio of 2 to 1 of more foot candle brightness.

An incident light meter measures the light incident upon a subject. Incident light meters are the preferred choice among commercial photographers and motion picture cameramen for measuring light.

Lastly, I would note that a foot candle is a unit of illumination equivalent to that produced by a standard candle at a distance of one foot.

Sincerely,

/s/ BILL
William H. Riley

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

**NO. 80-3039B**

EXCERPT
April 21, 1980

STATE OF FLORIDA,

*Plaintiff,*

*-vs-*

JOHNNY L. JONES,

*Defendant.*

* * * * *

[Assistant State Attorney] DEPOSGAY: This is also being televised, and this is also going into the news media, and I have repeatedly and did ask your Honor last time to order the television not to make comment on the strength or weakness of witnesses' testimony.

[Defense Attorney] McGUIRK: I don't want my arguments publicized, your Honor, that I have pending

before the Court. Would your Honor — frankly, I think Mr. DePozgay's objection is well taken, and one of our Motions addresses that precise issue.

. . . We would ask leave, of course in the event your Honor decides to proceed with the trial of this case today — we would ask leave of Court to have a photographer for the defense come into the courtroom and take pictures in this courtroom and in the hallway outside for the purpose of demonstrating in the Record the nature of the — well, for example, there are special lights, lighting, and spotlights. There are cameras in the courtroom. I noticed during a Hearing this past week there was a still photographer who was taking pictures in the courtroom and we simply ask leave of Court to take pictures so we may have a photographic record of the atompshere [sic] in the courtroom and in the hallway outside.

[Assistant State Attorney] RICHEY: Judge, we would ask that when the jury does come in that these lights could be turned down so they're not right in their eyes, if the lights could be dimmed during the voir dire, perhaps not during the trial — if that is acceptable to the Court.

* * * * *

[Assistant State Attorney] LOWEY: . . . we do think the lights could be dimmed. They are shining in our eyes, which is disconcerting us. I don't know what the jury situation would be. It is directed at our table and not the jury box.

* * * * *

Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

CASE NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
APPELLANTS,

vs.

THE STATE OF FLORIDA,
APPELLEE.

---

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

---

## BRIEF OF APPELLEE, THE STATE OF FLORIDA

---

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Attorneys for Appellee

## QUESTION PRESENTED

WHETHER THE DEFENDANTS NOEL CHANDLER AND ROBERT GRANGER, RECEIVED A FAIR TRIAL UNDER THE SIXTH AMENDMENT, AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

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## PREFACE

The Appellants, Noel Chandler and Robert Granger, were the Defendant in the Florida trial court below. The State of Florida was the prosecution below. In this brief, the parties will be refered to as they appeared in the trial court below.

The following references are made in this brief:

(R) For the Record-on-Appeal previously transmitted under separate cover and consisting of pages R1-R1317.

(A) For the Joint Appendix submitted by the parties consisting of page A1-A17.

(AA) For the Appendix to the brief of the State submitted herewith, consisting of pages AA1-AA72.

(AB) For the Appendix to the Defendants' brief consisting of page AB1-AB18.

I.

## OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, affirming the convictions of the Defendants, Chandler and Granger, is reported at, Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979). The opinion of the Supreme Court of Florida affirming the Florida District Court of Appeal and dismissing the Defendants' Petition for Certiorari is reported at, Chandler v. State, 376 So.2d 1157 (Fla. 1979). There are no official reports for citation of these decisions.

## II.

## JURISDICTION

On September 27, 1979, and by rehearing denied on December 10, 1979, the Supreme Court of Florida declined to consider the Defendants' complaint in both the District Court of Appeal and the Supreme Court that the presence of a television camera during their criminal trial below was unconstitutional per se, under, Estes v. Texas, 381 U.S. 532 (1965). See, 366 So.2d at 69 (certified question); 376 So.2d 1157. The Supreme Court of Florida considered the question moot in view of, Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), which was rendered during the pendency of the Defendant's appeal from the District Court of Appeal.

On January 3, 1980, the Defendants filed a timely Notice of Appeal. See, Appendix to Jurisdictional Statement, at 26. Jurisdiction is properly lodged in this Honorable Court pursuant to 28 U.S.C. § 1257(2).

## III.

## CONSTITUTION AND STATUTORY PROVISIONS

U.S. Constitution Amend.VI provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Constitution Amend.XIV provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 16 of the Constitution of the State of Florida provides that:

> "SECTION 16. Rights of accused.--In all criminal prosecutions the accused

> shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. . . ."

Section 924.33, F.S. (1977) provides:

> "When judgment not be reversed or modified.--No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. . . ."

Canon 3A(7) of the Florida Code of Judicial Conduct (1979) provides:

> "Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure, decorum and prevent distractions, and (iii) ensure the firm administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida."

IN THE

# Supreme Court of the United States

CASE NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
APPELLANTS,

vs.

THE STATE OF FLORIDA,
APPELLEE.

---

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

---

## BRIEF OF APPELLEE, THE STATE OF FLORIDA

---

## IV.

## STATEMENT OF THE CASE

The Defendants, Noel Chandler and Robert Granger, were charged by information with one count of consipracy; one count of burglary; one count of grand larceny and one count of possession of burglary tools, arising out of their burglary on May 23, 1977, of Picciolo's

Restaurant, Miami Beach, Florida. See, R1098-1100. The Defendants were both police officers employed by the City of Miami Beach, Florida. See, Chandler v. State, 366 So.2d 66 (Fla.3d DCA 1979). The Defendants' apparent theory of the case below, was that the ham radio operator's inadvertent recording of their conversations on their walkie-talkie radios as they burglarized Picciolo's Restaurant, was not made on the night that Picciolo's was burglarized, but instead was made a week later when the Defendants "staged" a burglary.[1] See, R222-224; R232-240; see also, 366 So.2d at 70. After a trial by jury, the Defendants were convicted as charged. R288-1291.

Relevant to this appeal, during the pendency of the prosecution below, the Supreme Court of Florida modified Canon 3A(7) of

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[1]The opinion of Chandler v. State, 366 So. 2d 64 (Fla.3d DCA 1979), contains an excellent summary of all other aspects of the trial below.

the Florida Code of Judicial Conduct to permit under specific guidelines, the presence of one television camera and one still photographer in fixed positions during the Defendants' trial[2]. Before trial, the Defendants filed assorted motions to declare Florida's experiment with Canon 3A(7) unconstitutional, alleging that the Defendants would not get a fair trial and that the presence of a camera[3] at trial

2. See, Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976), modified, 337 So.2d 804 (Fla. 1976); modified, 347 So.2d 402 (Fla. 1977), modified, 347 So.2d 404 (Fla. 1977). Florida Judicial Canon 3A(7) was only suspended and was never actually modified during a year of an experimental pilot program. See, 347 So.2d at 404-405. Subsequently Canon 3A(7) was reviewed and modified as a permanent rule consistent with the one year pilot program. See, Post Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979); see also, Petition of Post-Newsweek Stations, Florida, Inc., 358 So.2d 1360 (Fla. 1978), modifying schedule and denying extension of the experiment).

3. In all of the Defendants' Motions and indeed, throughout the argument in both the Defendants and the Amicus Curiae briefs, incorrect reference is made to television "cameras" and to still "photographers" at the Defendants' trial. It

will harm "prospective" witnesses, jurors, the Defendants' attorney and the trial judge. A3-A5 (R1117-R1118; R1126-R1127). The Defendants also claimed that since there had been a "substantial amount" of pretrial publicity, the Defendants would be denied due process of law. See, A4 (R1118; R1127). The Defendants subsequently renewed their motions, objecting to the presence of a television camera and a still photographer[4] in their trial and moved to exclude them. A5 (R1124-R1125). All of the Defendants' Motions were denied. See, A6 (R1128); AB4. The transcripts of the hearings upon the foregoing motions are not included in the Record-on-Appeal. Similarly, a pretrial Motion to Suppress was also heard

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3. (cont.) is undisputed that there was only one television camera during the trial and that there was no reference to the one still photographer permitted, at any time.

4. Note 3, supra.

and denied in the case at bar[5]. See, R1129-R1135; R2-R42.

On December 1, 1977, when the parties convened to select a jury, the Defendants renewed their motion to exclude a television camera and a still photographer from their trial, upon the ground that Canon 3A(7) [as modified by Court rule] was unconstitutional. See, A6-A7 (R55-R57; R1104). The Defendants also orally requested that the jury be sequestered, because the television camera would be at the trial. A6-A7 (R57). There was neither a still camera nor a television camera present at the time of the Defendants' oral motions. See, A7 (R55-R57). Both of the Defendants' Motions were denied. A6-A7.(R57). The Defendants further asked the trial Court to instruct witnesses not to watch any television

---

5. There were no electronic media noted as presented on the record, at any of the pretrial proceedings.

accounts of the trial, which was granted. See, A7 (T57-T58). Subsequently, the Defendants complained to the trial Court that one witness, Donald Froschneider, could not attend because he was too sick. T60. The Court indicated it would provide appropriate remedies. See, T60-T61. Thereupon, the panel of jurors was subsequently brought in and the voir dire of the panel to select a petit jury began. See, R16; R1104.

Relevant to this appeal, the jury in the case at bar ultimately consisted of, Burton (No. 371); Cook (No. 3880); Fleming (No. 440D); Metzger (No. 396D); Callahan (No. 356); Hawkins (No. 410) and an alternate, Turner (No. 385). See, R1104-R1105. At the beginning of jury selection, during a side bar conference, defense counsel noted for the record that, "the [television] cameras are in the courtroom." A8(R65). The trial court corrected defense counsel,

observing that, "[t]here is a [television] camera in the Courtroom"[6]. See, A8(R65). During the subsequent voir dire, Burton testified that she had heard something "on the news," about the case, but could not recall, "too much about it" and that she had formed no opinions about the guilt or innocence of the Defendants. R121-R122. Callahan stated that:

> "I read a little piece in the newspaper about it. That is about the same information you have given so far."
>
> R132.

Cook testified as to his knowledge of the case thus:

> "THE COURT: Do you know anything about this case from the media?
>
> "MR. COOK: Possibly something from television, but nothing that I can clearly remember.
>
> "THE COURT: You did not form any opinions about the guilt or innocence of these defendants, did you?

---

6. The camera was from Channel 10, WPLG, Miami, Florida, which is operated by Post-Newsweek Stations, Florida, Inc. See, R65;R374.

"MR. COOK: I did not.

R178.

The alternate juror, Turner, who did not participate in the deliberations below[7], testified that:

> "THE COURT: Do you know anything about the facts of this case, Mr. Turner?
>
> "MR. TURNER: Only one point that I heard on the radio. All I remember was the radio.
>
> "THE COURT: Did you form any opinions about the guilt or innocence of these defendants?
>
> "MR. TURNER: None whatsoever."

R192.

All of the other jurors and prospective jurors had not seen, heard or read anything whatsoever about the case. R74 and R93 (Fleming); R76 and R93 (Metzger); R155 (Hawkins); R72, R80, R82, R93, R130, R135, R153, R158, R164 (all other prospective jurors). Burton, Cook, Callahan and Turner affirmatively testified that they would each put aside anything that they might know or

[7]. See, R1113; R1071.

might remember and would decide the case only upon what they heard in the Courtroom. R122 (Burton); R132 (Callahan); R178-R179 (Cook); R192 (Turner). All of the jurors were specifically instructed at the beginning of the trial to confine their deliberations to what they have heard in the trial, thus:

> "During the trial, you must not discuss the case among yourselves, nor with anyone else, nor permit anyone to discuss it in your presence. You must also avoid watching, reading, seeing or listening to anything about this case on any of the media. You must confine your deliberations in this case specifically to what you have heard in this courtroom."
>
> A13(R204).

The jurors and prospective jurors affirmatively indicated that they would abide by the instructions of the trial court. See, R97; R114-R116; R142; R149; R185. The jurors also indicated that if anything "came up" during the course of the trial regarding the trial court's instructions, that they would bring it immediately to the

attention of the Court. See, R99; R116; R142; A12 (R183); A12 (R196). At the beginning of the trial the court instructed the jury that they must follow the court's instructions throughout the trial, to wit:

> "At this time, we are going to take a ten-minute recess, after which you will hear the opening statements of the lawyers. At this recess and all others, you must remember and obey the instructions that I gave. Do not form opinions about the case. Do not form or discuss it with anyone else until it is all over."
>
> R204.

Relative to the presence of a television camera, juror Fleming testified that she was familiar with and had seen a portion of the "Zamora" trial[8]. on a television news program. A8 (R93). Thereupon, during the questioning of a prospective juror, Warren[9]., the following exchange

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8. See, Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978).

9. Warren was subsequently dismissed from the jury by the Defendants. See, R116; R1104.

took place".

"[By Defense Counsel],

MR. HIRSCHHORN: Was there anything about the fact that that case as being televised live that would affect you here today? In other words, before you jump to the answer, it is important because not every case is televised.

"What I am trying to find out really is will you be able to be as conscientious, as fair and as impartial in this case, even if that camera remains in this courtroom during part or all of this trial, or are you likely to say to yourself, "Well, there is something special about this case," and perhaps give this case a different kind of treatment that you would.

"Miss Warren?

"MISS WARREN: Yes.

"MR. HIRSCHHORN: Mr. Vidal --

"THE COURT: That "yes" was --

"MR. HIRSCHHORN: It is telling me something, Judge. I understand, but if I might get back to it, Your Honor --

"THE COURT: I hestitate to have the record leave that "yes" in the record, as is.

"MR. HIRSCHHORN: I understand. I will get back to it, if I might, Your Honor.

. . .

"MR. HIRSCHHORN: Miss Warren? Can you hear me now?"

"MISS WARREN: Yes. I hear you."

A8-A9 (R94-R95).

Contrary to the Defendants' "Statement of the Case" (p.6), the prospective juror, Warren's "yes", is (as the trial court attempted to clarify), only a response to the question, "Mrs. Warren?" It is not, as the Defendants strain to infer, an indication that the prospective juror attached more importance to the case, because of the presence of a camera. As part of a response to the inquiry of the prospective juror Warren, juror Metzger indicated, that the mere presence of a camera during the trial did not give the trial any special importance and that with the camera present he would be fair and impartial. A9 (R94-R95). Juror Fleming was asked the same questions together with Metzger, but the record reflects no separate response. See, A8-A9 (R94-R95). The jurors and the

alternate juror indicated that the mere presence of a television camera during the trial would have no effect upon them as jurors[10]. See, A11 [R95 (no verbal answer) and R141](Fleming); A11 (R141)(Metzger); A11 (R168)(Hawkins); A12 (R182) (Cook); A12 (R196)(Turner). Both the Defendants and the State accepted the jury and the jury was thereupon sworn in. R202-203.

On December 5, 1977, at the beginning and conclusion of the first day of the trial, the Defendants again orally moved to sequester the jury, stating on the latter occasion that the jury should be sequestered "in light of the media coverage". A13 (R205); A14 (R350). The Record-on-Appeal is utterly devoid of any showing at

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10. Jurors, Burton and Callahan, were not specifically asked this question by defense counsel, but were present when Hawkins, Cook and Turner were asked the same question. See, R117 (Burton and Callahan called as jurors). Two of the jurors were asked if they had been on television and Metzger replied that he had. A10 (R96).

anytime, of the kind or extent of publicity or media coverage, or any other facts supporting a sequestration of the jury. The Defendants' Motions were both denied. A13 (R205); see, A14 (R305). The trial Court specifically again instructed the jury at the conclusion of first day of trial that:

> "THE COURT: It is also very important that you are to avoid seeing and hearing anything about this case as reported in any of the media. Do not read any newspaper articles about it. Perhaps it might be a good idea if you just avoid the local news and watch only the national news on television. If somebody calls out any report of this case to your attention, you may say that is the jury I am serving on. Do not say anything more about it."
>
> "It is very important, as I told you, you are not to let anything which happens outside the courtroom interfere. Your decision must be based solely on what happens inside the courtroom."
>
> A13 (R349).

Subsequently, the court's instructions were renewed at the conclusion of the state's case and again after the Defendant's case

and both parties had rested[11]. A16-A17 (R653; R923). For the first time at the conclusion of the first day of trial, the Defendants requested that the trial court rather than counsel for the respective parties instruct each witness as to television sequestration. A14 (R350). The trial court declined, finding that instruction by counsel would be sufficient and that no witness testimony had been reported by the media. A14 (R350). There was no testimony at trial that any witness had seen, heard or read any other witnesses' testimony in violation of sequestration or that witness sequestration had been violated in any way.

On appeal to the District Court of Appeal of Florida, Third District, the Defendants claimed, relevant to the case at bar, 1) that the Florida experimental pilot

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11. The parties produced nineteen (19) witnesses and sixteen (16) witnesses respectively.

program permitting cameras in the courts of Florida is unconstitutional per se; 2) that the trial court erred in refusing to exclude a television camera from their trial and 3) that the trial court erred in refusing to sequester the jury[12.], 366 So.2d at 69. The Florida District Court rejected the Defendants' claim that the pilot program was unconstitutional per se, upon the reasoning, that by virtue of the fact of the one year pilot program, the Florida Supreme Court had made a preliminary determination that a camera in a Florida courtroom was not unconstitutional per se. 366 So.2d at 69. Nevertheless, the Florida District Court certified the question to the Florida Supreme Court as a question of great public interest. See, Fla.R.App.P. 9.030 (a)(2)(A)(ii). The

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12. No issue of witness sequestration was asserted in the Florida appellate courts. See, Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979).

District Court rejected the Defendants' latter contentions also, opining that:

> "We pass on to that portion of the defendants' point which urges that matters occurring in their trial pursuant to the experimental canon deprived them of their right to a fair trial and was violative of due process of law. The defendants urge error with regard to two rulings allowing television cameras in the courtroom during their trial; error is urged (1) in declining to preclude television cameras from their trial and (2) in declining to sequester the jury. However, the defendants have not met their burden of showing from this record that either of these circumstances operated to deprive them of a fair trial.
>
> "We have examined the record in the light of the defendants' contentions under this point and find no reason on this record to hold that the admission of television cameras into this particular trial caused the defendants any difficulty in the preparation or presentation of their case or deprived them of a impartial jury. Accordingly, we hold that no error is shown by the defendants' first point.
>
> 366 So.2d at 69.

Relevant to this appeal, the Supreme Court of Florida found the certified question regarding the constitutionality per se of the presence of a television camera moot

in view of Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), which was rendered during the pendency of the appeal from the Florida District Court. 376 So.2d 1157. The Court declined to entertain the remaining questions upon jurisdictional grounds. Id. The Defendants subsequently filed a timely Notice of Appeal in this Honorable Court.

V.

## SUMMARY OF ARGUMENT

### First Issue

THE DEFENDANTS RECEIVED A FAIR TRIAL UNDER THE SIXTH AMENDMENT.

The Defendants' argument is dehors the record. The Defendants cannot defeat their lawful convictions in the total absence of a record showing of the nature and extent of pretrial and trial publicity or any other relevant showing of prejudice. The Defendants cannot defeat their convictions by arguing the hypothetical rights of hypothetical persons in hypothetical circumstances under Canon 3A(7), absent a clear First Amendment claim. The record affirmatively demonstrates that the participants and the jurors were wholly unaffected by any publicity and the mere presence of a television camera during the trial below. The Defendants' attempt to upset their convictions by a post hoc attack upon

Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), must be rejected.

Second Issue

ESTES V. TEXAS, 381 U.S. 532 (1965) IS NOT A MANDATE FOR THE PROPOSITION THAT A CAMERA IN A COURTROOM IS UNCONSTITUTIONAL PER SE.

Proper analysis of Estes v. Texas, affirmatively demonstrates that Estes is not a mandate against the mere presence of a camera in a courtroom. Historical analysis reveals that both Estes and ABA Canon 35 were the peculiar result of limited historical circumstances. Estes must therefore be confined as a precedent to its peculiar facts. The argument, that it is okay if some of the people see a trial, but it is unconstitutional if all of the people see a trial, is without a rational, constitutional basis. To the contrary, the actual experience of Florida and other states and the experimental and permanent

rules in more than twenty-eight (28) states affirmatively demonstrate that a camera in a courtroom is not unconstitutional per se. The parade of horribles and hyperbole suggested by the Defendants because of the mere presence of a camera have not materialized in the actual experience of Florida and other states. The Florida Supreme Court's amendment of Florida Judicial Canon 3A(7) is well reasoned and soundly based upon substantial policy considerations of proper judicial administration, which are underscored in both Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), and Richmond Newspapers v. Commonwealth of Virginia, __ U.S. __, 48 U.S.L.W. 5008 (1980).

Third Issue

IN THE TOTAL ABSENCE OF A CLEAR AND OVERRIDING FEDERAL INTEREST, THIS HONORABLE COURT SHOULD NOT INTERFERE WITH THE ADMINISTRATION OF THE STATE COURT JUDICIARY.

The maintenance of the principles of comity and federalism are a primary consideration in interpreting the application of the Sixth Amendment to the States through the Fourteenth Amendment, to state action. This Court has consistently encouraged experimentation in the "laboratory" of the states predicated upon the basic structure of federalism. The substantial state interest in Florida in open government and public confidence in the judiciary, is a reasonable and rational basis for the exercise of the Supreme Court of Florida's supervisory powers of judicial administration. The fact of earnest experimentation of the states with respect to electronic media in state courtrooms should be left unfettered, absent a clear, compelling and substantial federal question.

VI

ARGUMENT

First Issue

THE DEFENDANTS DID RECEIVE A FAIR TRIAL UNDER THE SIXTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The argument of the Defendants, Chandler and Granger is dehors the record in the case at bar. The Defendants unabashedly complain in anecdotal fashion, without references or citation of authority, about the recent trials of other defendants in Florida where a camera was present[13]. Neither the Defendants nor the

13. See, State v. Jones, 11th Jud.Cir. Case No. 80-3039 (Grand Theft-no objection to camera); State v. Diggs, 11th Jud.Cir. Case No. 79-21601 (Murder, so called "McDuffie" case-no objection to camera; defendants acquitted); State v. Bundy, 4th Med.L.Rptr. 2629 (Fla. 11th Cir. 1979)(Murder-no showing that closure warranted; and that alternative trial management methods will not suffice); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978)(Murder-no objection to camera); see, also,e.g., where a camera was present without objection, Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979); Jacobson v. State, 375 So.2d 1133 (Fla. 3d DCA 1979); Powers v. State, 369 So.2d 640 (Fla. 3d DCA 1979); Hoy v. State, 353

amicus curiae briefs of the California Public Defender and the American College of Trial Lawyers, make any effort whatsoever, to discuss how Noel Chandler and Robert Granger were denied either an impartial jury or a fair trial. Instead, the Defendants and the amicus curiae briefs speculate ad infinitum, as to the hypothetical effects of a camera upon hypothetical circumstances involving hypothetical defendants, jurors and witnesses. Instead of addressing the case at bar, the Defendants and the amicus curiae argue irrationally, 'what if' this and 'what if' that[14]. See also, Gerbner, "Trial by

13. (cont.) So.2d 826 (Fla.1978), cert.den., 439 U.S. 820 (1979). The Appellee, the State of Florida would offer this Honorable Court for consideration at its leisure, both the P.B.S. tapes of the Jones, Bundy; Diggs, Powers and Zamora trials together with the equipment necessary for this Honorable Court's viewing of what the Defendants term "debacles" (Br. at p. 33).

14. As for example the Defendants and amicus assume that a "distraction" in a courtroom is permanent, irrevocable, preju-

Television: Are we at the Point of No Return?" 63 Judicature 416 (1980), (assuming and comparing televised trials with commercial programming); "Televising Court Trials in Canada: We Stand Guard for a Legal Apocalypse:, 5 Dalhonsie L.J. 694 (1979). Indeed, the Defendants substantially concede that there was no "specific mischief: in the case at bar even to demonstrate arguendo that their trial was unfair or the jurors were not impartial. (See, Br. at p. 13 and 69). See also, Br. Amicus Ca.Pub. Def. at p. 26 ("nothing can be proved"); Br. Amicus Amer. College Trial L., p. 24 (prejudice in presence of a camera, "not identifiable").

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14. (cont.) dicial and unconstitutional; that the incremental presence of a television camera for any length of time renders any length of trial suddenly unconstitutional; that if a television camera is not present in a high interest trial, there will be no publicity to affect the court, parties, witnesses or jurors.

At the outset, the State would note that the Defendants characterize their challenge herein as one directed at a statute (Br.,p.3). In United States v. Raines, 362 U.S. 17, 21 (1960), relevant to the case at bar, the Court observed that:

> "One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." [Emphasis added].

More recently, in County Court of Ulster County, New York v. Allen, __U.S.__, 99 S.Ct. 2213 (1979), the defendant/petitioner upon a due process claim had sought to overturn New York Penal Law §265.16(3), which provides that the presence of a firearm in a vehicle is presumptive of its possession by the occupants. Id. at 2217. The United States Court of Appeals for the Second Circuit had held that the statute was "unconstitutional on its face."

568 F.2d 998, 1009. In reversing the Circuit Court of Appeals, the Allen Court again emphasized that:

> "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (and cases cited). A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. . . . This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. E.g., Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408; Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22." [Emphasis added]. 99 S.Ct. at 2223.

The Allen Court, finding no First Amendment claim, held the New York Statute was constitutional as applied. 99 S.Ct. at 2226-2230. See also, California Bankers Association v. Shulty, 416 U.S. 21, 71-72 (1974) (where the Court declined to con-

sider a Fifth Amendment claim based upon speculation and hypothetical persons); Cf., Parker v. Levy, 417 U.S. 733, at 756 (1974) ("one to whose conduct a statute clearly applies may not challenge it for vagueness"); State v. Ecker, 311 So.2d 104, at 110 (Fla. 1975), cert. den. 423 U.S. 1019 (1975), ("while the loitering statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional").

The fundamental policy underlying a requirement that a defendant must make a showing of actual prejudice and thereby a personal stake in the outcome of the controversy is, "to assure, that concrete adverseness, which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions [.]" Baker v. Carr, 369 U.S. 186, at 204 (1962); see, also Estes v. Texas, 381 U.S. 532 at

601-604 (Stewart, J., joined by Black, J.; Brennan, J. and White, J., dissenting) (the court should not elevate hypothetical examples into a per se rule of constitutionality). Otherwise, this Court is relegated to being a "roving [commission] assigned to pass judgment on the validity of the [state's] laws." Broderick v. Oklahoma, 413 U.S. 601, 611 (1973); see, Younger v. Harris, 401 U.S. 37, 52 (1971). Even where there is a First Amendment issue present:

> "[I]f the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' see Erznozmik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125, the litigant is not permitted to assert the rights of third parties." [Emphasis added].
>
> Young v. American Mini Theaters, 427 U.S. 50, 60 (1976).

See, Allen, 99 S.Ct. at 2223-2224, n.14. In the case at bar, ironically a First Amendment issue is not with the Defen-

dants, but may oppose them. See, Richmond Newspapers and discussion infra. Under Allen and Broaderick, and the sound policy of the foregoing decisions, this Court should not elevate the Defendants' summary allegations to constitutional significance, but rather should look to the record and the circumstances of this case.

B. In Russell v. Southard, 53 U.S. 12 (How.) 139, 158-159 (1851), the court stated the principle thus:

> "This Court must reverse or affirm upon the record."

This requirement is particularly applicable in the case at bar, revolving substantially upon a challenge to the impartiality of the jury and the fairness of the trial as it relates to publicity of the trial. See, Reynolds v. United States, 98 U.S. 244, 247 (1878). In Beck v. Washington, 369 U.S. 541, 558 (1962), the Court explained succinctly that:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' United States ex rel. Darey v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100, L.Ed. 1331 (1956). This burden has not been met." [Emphasis added].

Accord, Irvin v. Dowd, 366 U.S. 717 (1961). The burden herein is therefore clearly upon the Defendants, not the State, to demonstrate actual prejudice. Murphy v. Florida, 421 U.S. 794, at 800-801 (1975); Irvin v. Dowd; Beck v. Washington, supra. There is no requirement that qualified jurors be totally ignorant of the facts and issues in a case. Murphy v. Florida, 421 U.S. at 800. Likewise, pretrial publicity, voluminous or otherwise, is also not in and of itself prejudicial. Nebraska Press Association v. Stuart, 427 U.S. 539, at 565-566 (1976); see, e.g., United States v. Haldeman, 559 F.2d 31 at 60, 62

n.37 (D.C. Cir. 1976), cert.den., 341 U.S. 933 (1977); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert.den., 429 U.S. 1120 (1977); Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975), cert.den., 425 U.S. 911 (1976); United States v. Mandell, 408 F.Supp. 673 (D.Md. 1975); 415 F.Supp. 1033 (D.Md. 1976); 431 F.Supp. 90 (D.Md. 1977). The Haldeman Court, observing the policy in Irvin v. Dowd, explains the fundamental analysis which must be forthcoming upon the claims in the case at bar:

> "Irvin established a 'common-sense standard' of juror qualification. United States v. Caldwell, 178 U.S.App.D.C. 20, 33, 543 F.2d 1333, 1346 (1974), cert. denied, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). In keeping with that approach, a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim 'not as a matter of speculation but as a demonstrable reality.' United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 865; 970, 100 L.Ed. 1331 (1956), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed.

> 268 (1942). This demonstration can be made only be reference to the voir dire." [Emphasis added, footnote ommitted]. 559 F.2d at 60.

Raw speculation is not enough. In Nebraska Press, this Court rejected the speculative analysis urged by the Defendants:

> "Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only 'a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial.' (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable." [Emphasis added]. 427 U.S. at 562-563.

Accordingly, in Irvin v. Dowd, relied upon by the Defendants for reversal herein, even in view of the publicity therein, the Court did not simply review the pretrial publicity and conclude that prejudice resulted. Rather, the court, "in-

dependently evaluate[d] the voir dire testimony of the impaneled jurors." See, 366 U.S. at 733.

In the case at bar, there is utterly nothing on the Record nor did the Defendants make any effort at a showing at any time of the kind or nature or extent of publicity or media coverage or any other facts showing actual prejudice. The Defendants also made absolutely no effort, as is their duty, to seek less stringent remedial measures, than exclusion of the camera and sequestration of the jury. See, American Bar Association Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press Standard 8-3.2 at 16 (Approved Draft 1978); see also, Nebraska Press v. Stuart, 427 U.S. 539, 562-565; Sheppard v. Maxwell, 384 U.S. 333, 354 n.9 and 358-362 (1966). The Record-on-Appeal clearly reflects a substantial voir dire.

R64-R205. None of the jurors was in anyway affected by the presence of a camera. See, A11-A12. The only prospective jurors who had even remotely heard of the case at bar, were ironically not excluded from the jury by the Defendants. R121-R122 (Burton); R132 (Callahan); R178 (Cook); R192 (Turner). None of the other jurors had ever heard of the case. Furthermore, none of the jurors had formed any opinion as to the guilt or innocence of the Defendants, unlike the extreme circumstances in Irvin v. Dowd, where two hundred and sixty eight (268) jurors were excused for cause, "as having fixed opinions as to the guilt of the [defendant]." 366 U.S. at 727. There is utterly nothing on this record to bring this case even remotely within the extraordinary and extreme examples, the Defendants rely upon. There is simply no showing on this record of a Sheppard "Roman Holiday"; or an Estes proceeding

"inherently lacking in due process"; or a showing as in Sheppard, of the lack of that "judicial serenity and calm to which [Sheppard] was entitled." 384 U.S. at 355; See, Goldman, J. and Larson, "News Camera in the Courtroom During State v. Solorzano: End to Estes Mandate?", 10 S.W.Nev.L.R. 2001, at 2011-2013 (1978). Similarly, Rideau v. Louisiana, 373 U.S. 723 (1963), is inapposite to the facts and circumstance herein. In Rideau, without examining the substantive record, the Court reversed the conviction and sentence of the defendant upon a finding of prejudice per se to the defendant in the trial court's refusal to grant a change of venue. 373 U.S. at 726. However, unlike the present circumstance, in Rideau, it was undisputed that the personal confession of the defendant had been presented to virtually all inhabitants of remote Calcasieu Parish, Louisiana, where the defendant was tried

and convicted. The Defendants in the case at bar, unlike Rideau, did not move for change of venue or dispute that they could not get a fair trial in Metropolitan Dade County, Florida and the Defendants cannot substantively dispute that the jury below, as impaneled, was fair and impartial. The rule of prejudice per se, under the unique circumstances of Rideau v. Louisiana, is not applicable to the facts in the case at bar. To the contrary, the Record herein affirmatively establishes that a fair impartial jury was not presented with and was unaffected at any time by any external influences [R74; R76; R121-R122; R132; R155; R178-R179; A12 (R183); R197]; that the jury was fairly and properly instructed [A13(R204); R204; A13(R349); A16-A17 (R653; R923)] and that the jurors were unaffected in their duty as jurors by the mere presence of a television camera [A9(R94-R95); A11(R141); A11(R168); A12(R182); A12 (R196)].

The Defendants have therefore failed in their burden to show the existence of actual prejudice, which affected the fairness of the trial and its participants or the impartiality of the jury. There is nothing on the record, but that the jurors' decision was based purely upon proper information received by them in open court. See, Chandler v. State, 366 So.2d 64 at 69.

C. Sub judice, the State submits that the Defendants seek to do here that which this Court has recently so decisively condemned in Richmond Newspapers v. Commonwealth of Virginia, __U.S.__, 48 U.S.L.W. 5008 (1980). Fundamentally, the Defendants claim, without any effort to show prejudice, that they have an absolute preemptive right to arbitrarily exclude the public at large through its "surrogate" the press. Recognizing that the courtroom could be literally jammed with members of the public, the De-

fendants apparently claim that they want a "public trial," but not "so public." Stated differently and in an historical context for emphasis, the Defendants contend that it is constitutional if some of the people in the 'village' of Miami view their trial, but that it is unconstitutional if all of the people in the 'village' of Miami view their trial. Of course, Miami is not a "village," but it is that proper historical analysis and context, which this Court applied in Richmond Newspapers, and which the State submits compels the same conclusion in the case at bar. In Richmond Newspapers, the parties had agreed to close a criminal trial arbitrarily, without any stated rationale except perhaps for a reference at an earlier hearing by the trial judge that the physical "layout" of the courtroom made, "having people in the courtroom. . . distracting to the jury." 48

U.S.L.W. at 5009. The Richmond Court rejected such arbitrary analysis and set forth the fundamental and overriding policy for public trials and public access to all trials in the face of arbitrary closure:

> "Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:
>
> 'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks: as cloaks in reality, as checks only in appearance.' 1 J. Bentham. Rationale of Judicial Evidence 524 (1827).[7]
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> * * *
>
> [7] Bentham also emphasized that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. Id., at 522-525." [Emphasis added].

48 U.S.L.W. at 5012.

See In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591,

296 P.2d 465 (1956); Hoyt, "Courtroom Coverage: The Effects of Being Televised," 21 J. Broadcasting 487, at 494-495 (1977); Weinstein, J. "Let the People Observe Their Courts," 61 Judicature 156 (1977); Nejelski, "Judging in a Democracy: The Tension of Popular Participation", 61 Judicature 166 (1977). The paramount value preserved by public attendance at trial is underscored by the court thus:

> "The nexus between openness, fairness, and the perception of fairness was not lost on [the English courts]:
> '[T]he judge, the counsel; and the jury, <u>are constantly exposed to public animadversion; and this greatly tends to augment the extraordinary confidence, which the English repose in the administration of justice</u>.' Goede, supra, at 215. [Emphasis not in original].
> "This observation raises the important point that'[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect on the quality of testimony.' 6 J. Wigmore, Evidence § 1834, at p. 435. (Chadbourn re. 1976).[8] The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value.

Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

"When a shocking crime occurs, a community reaction of outrage and public protest often follows. See H. Weihofen, The Urge to Punish 130-131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help,' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers. 'The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate[] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security, and, perhaps, to satisfy that latent 'urge to punish.'' Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U.Pa.L.Rev. 1,6 (1961).

"Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done——or even the urge for retribution. The crucial prophylactic aspects of the

> administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' Supra, at——. It is not enough to say that results alone will satiate the natural community desire for 'satisfaction.' A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpectd outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process 'satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it." [Emphasis added].
>
> 48 U.S.L.W. at 5012.

The Richmond Court's analysis of the public function of the Courts and the public's right to observe justice, is a veritable primer on the essence of the criminal justice system. In delineating the essential qualities of a public trial, however, the Court also took judicial notice of the essential fact that the right of public observation of trials has drastically decayed as a consequence of the literal growth of

society beyond the capabilities of its members to attend, "the ancient, 'town meeting' form of trial." Id. Directly applicable to the present circumstance, the Richmond court then observed that in modern society:

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . .' Nebraska Press Assn. v. Stuart, 427 U.S. 539, 587 (BRENNAN, J., concurring)." [Emphasis added].
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> Id., at 5012-5013.

The State submits that the fundamental historic value expressed by the Richmond Court must of necessity return to its original intended zenith where the public right of observation is revived by the presence

of its surrogate—the electronic media such that the public may actually see and hear for itself "the ancient town meeting form of trial" rather than relying solely upon the oral and written impressions of the trial by the print and electronic media[15]. See, Weinstein, supra;

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15. As for example, in the Goldman Article noted above, "News Cameras in the Courtroom," 10 S.W.Nev.L.R. 2001, at 2012, n. 70-71, the "impressions" of the Sheppard case relayed to the public are described:

> '70. 384 U.S. at 338-43. The anti-Sheppard publicity continued unabated throughout the trial as both the police and press had long since concluded that it was an open-and-shut case as to the defendant's guilt. Id. at 345-49. But Who Will Speak for Marilyn? asked one newspaper headline. Another banner read: Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin to Testify. Id. at 346-48. What seemed to incense the local press was the fact that the Sheppard family was close-knit, wealthy and protective. The failure of the police to produce dramatic evidence as to Dr. Sheppard's guilt, and his steadfast claim as to his innocence, led the press to openly suggest that the defendant was literally getting away with murder. Id. at 338-42, 345-49.
>
> '71. Local newspaper editorials contained the following headlines: Why No Inquest: Do It Now, Dr. Gerber: Why Isn't Sam Sheppard in Jail?; Quit Stalling—Bring Him In. Id. at 339-41."

Miller and Wiggins, "Should Canon 35 be Amended?" 42 A.B.A.J. 834 (1956); Heflin, J. "Fair Trial vs. Free Press: Time for Rehearing?" 61 Judicature 154 (1977); Miller, "Public Confidence in the Judiciary; Some Notes and Reflections," 35 Law and Contem. Prob. 69, at 91-92, (1970); Wilson, "Justice in Living Color: The Case for Courtroom Television," 60 A.B.A.J. 294 (1974); see also, Note, "United States v. CBS: Where Sketch Artists are Allowed in the Courtroom, Can Photographers be far behind?" 1975 Duke L.J. 188. The Richmond Court in its final analysis did not distinguish between an arbitrary exclusion of the print and electronic media and an arbitrary exclusion of the public:

> "That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the

> past, most people receive information concerning trials through the media whose representatives 'are entitled to the same rights [ to attend trials] as the general public.' Estes v. Texas, supra, at 540." [Emphasis added].
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> Id., at 5014 n. 13.

Finally, consistent with the foregoing analysis at Points "A" and "B" above, the compelling reason for the implementation of the Richmond decision herein is expressed in the Court's concluding paragraph:

> "Having concluded there was a guaranteed right of the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in Gannett, supra, made clear that although the Sixth Amendment guarantees the accused a right to a public trial. 443 U.S., at 382. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pre-

trial proceeding dealt with in Gannett, supra, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. at 563-565; Sheppard v. Maxwell, 384 U.S. at 357-362. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. See Sheppard v. Maxwell, 384 U.S. at 359. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.18" [16.] [Emphasis added]. Id. at 5015.

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16. At footnote 18, the Richmond court cautions that:

"We have an occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., e.g., 6 J. Wigmore, Evidence § 1835 (Chadbourn rev. 1876) but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute."

The State however would expressly join in the alarm expressed by Mr. Justice

So too in the case at bar, the Defendants have erroneously sought an absolute right to exclude the public through its "surrogate" the electronic media without any Record showing that alternatives were inadequate. In reality, the substantial alternatives of voir dire, witness sequestration and cautionary instructions were entirely adequate in attaining a fair trial for Noel Chandler and Robert Granger. Where the disputed Rule, Florida Judicial Canon 3A(7), was so clearly constitutional as applied, the Defendants cannot lawfully complain of error. Con-

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16. (cont'd.)Blackmun in his concurring opinion, that the court has "eschewed the Sixth Amendment," and set forth a "troublesome" "standard" and "strictness" of closure, 48 U.S.L.W. at 5021. The trial courts must retain unfettered discretion to properly control their courtrooms, subject to traditional concepts of appellate analysis. See, Gregg v. Georgia, 428 U.S. 153 (1976); Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 779 & 781 (Fla. 1979).

sistent with the analysis of the Richmond court and the decisions noted above at Points "A" and "B", the State Court convictions herein should be affirmed.

Second Issue

ESTES V. TEXAS, 381 U.S. 532 (1965), IS NOT A MANDATE FOR THE PROPOSITION THAT A CAMERA IN A COURTROOM IS UNCONSTITUTIONAL PER SE

The Defendants and the Amicus Curiae briefs rely heavily for their substantive analysis and even for the structure of their presentation upon the opinion of the Court in Estes v. Texas, 381 U.S. 532 (1965) (plurality). However, neither the opinion in Estes nor any decisions of this Court since Estes supports a per se ban upon a television camera's presence in a courtroom.

HISTORICAL ANALYSIS

A. The original prohibition against taking photographs and broadcasting in the courtroom was embodied in Canon 35, ABA Canons of Judicial Ethics. Warden,"Canon 35: Is there Room for Objectivity?" 4 Washburn L.J. 211 (1965) ("Of all the many

acts of the American Bar Association, the adoption and promotion of Canon 35 has been most controversial"). Canon 35 was the result of the "courtroom bedlam" and excessive publicity which inundated the trial of Bruno Hauptmann for the kidnapping of the Lindbergh baby [17]. See, Kielbowiez, "The Story Behind the Adoption of the Ban on Courtroom Cameras", 63 Judicature 14 (1979); Note, "Cameras in the Courtroom: A Denial of Due Process?," 30 Baylor L.R. 852 (1978). The Hauptman trial was broadcast by radio and featured photographers leaping about like acrobats, witnesses tripping over cables and broadcasting equipment and a constant traffic of messengers to the media. See, State v. Hauptman, 180 A. 809 at 827-828. Doubles, supra, Note 17

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17. See, State v. Hauptman, 115 N.J. 412, 180 A. 809 (1935), cert.den., 296 U.S. 649 (1935); Doubles, "A Camera in the Courtroom," 22 Wash. and Lee L.Rev. 1 (1965)

at 2. Throughout the trial, the courtroom was also crowded with spectators who displayed frequent outbursts of approval, censure and even applause at the testimony of witnesses. Hauptman, 180 A. 809, 827-828. In a hurried effort to prevent additional occurrences in the nature of the Hauptman trial, the ABA acted swiftly, setting a special committee to investigate the Hauptman trial and the "Baker Committee" to propose regulations. See, Kielbowicz, 63 Judicature 14, at 20-21. The ABA House of Delegates heard the report on September 27, 1937, and resolved "that the committee report be approved to the extent that it has been concurred in by the three groups; and that the committee be continued for the purpose of obtaining, if possible, an agreement of the three groups concerned." A.B.A. Rep. 240 (1937) quoted in Hollam,

Some Object Lessons on Publicity in Criminal Trials, 24 Minn.L.Rev. 453, 464 (1940). Three days later, on September 30, 1937, through an "unfortunate lack of coordination" (Id. at 465), the House of Delegates passed Canon 35 with a number of other amendments to the Canons and Professional and Judicial Ethics submitted by the Professional Ethics and Grievances Committee. Canon 35 was passed without a reading, without discussion, and without reference to the need for further study announced three days earlier. Kielbowicz, 63 Judicature 14 at 22. The evils attributed to media activities in the courtroom were not derived from any empirical study of media behavior during trials nor from any research whatsoever except for the Hauptman trial. Id; see, Blasfield, "The case of the Controversial Canon," 48 A.B.A.J. 429 (1962), Warden, "Canon 35: Is there Room for Objecti-

vity?," 4 Washburn L.J. 211, 230-231 (1965); see also, In Re Mark, 386 Pa. 251, 126 A.2d 679 at 694 (1956). In 1938 a report by a joint committee of the ABA expressed the belief that the new Canon was impractical and that the ABA acted too hastily in its passage. Blasfield, 48 A.B.A.J. 429 at 430.

The original Canon 35 gave three (3) reasons to exclude the media:

> "Improper Publicizing of Court Proceedings. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated [1] to detract from the essential dignity of the proceedings, [2] distract the participants and witness in giving his testimony, [3] degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

In 1952 Canon 35 was amended to add a fourth reason, that media access would, "distract the witness in giving his

testimony." 77 A.B.A. Rep. 110 (1952). An exception was also added for naturalization, "for the purpose of publicly demonstrating in an impressive manner the essential dignity and serious nature of naturalization." Thus, a camera at a naturalization proceeding will convey dignity but at a trial it is "calculated to detract from the essential dignity."[18] In 1972, the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A(7) superseded Canon 35. The Special Committee on Standards of Judicial Conduct which drafted the Code seriously doubted the propriety of treating media access as an ethical question. See, Thode, Reporters Notes to Code of Judicial Conduct, 57 (1973). In 1978, both the ABA Standing Committee on Association Standards for Criminal Justice

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18 The phrases "calculated to" and "degrade the court" were dropped in 1963 88 A.B.A. Rep. 117 (1963).

and the ABA Committee on Criminal Justice recommended approval[19] of Standard 8-3.6(a) of the American Bar Association Standards Relating to the Administration of Criminal Justice 2d Ed. (Tentative Draft 1978), which provides inter alia that:

"Standard 8-3.6. Conduct of the trial

"The following standards govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial materials are raised.

(a) Use of the courtroom

Whenever appropriate, in view of the notoriety of a case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignement of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding. Television, radio, and photographic coverage of judicial proceedings is not per se inconsistent with the right to a fair trial. Subject to conditions and restrictions established by local rule

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19. See, Whisenand, "Cameras and Courtrooms: Fair Trial-Free Press Standards" 52 Fla.Bar.J. 456 (1978).

> or by agreement with representatives of the news media, such coverage should be permitted if the court in the exercise of sound discretion concludes that it can be conducted unobtrusively and without distracting the attention of trial participants."

This proposed Standard was apparently defeated by a voice vote on February 12, 1979. The ideas incorporated in Canon 35 were applied to the Federal Court System on March 12, 1962, by a resolution of the Judicical Conference of the United States. This resolution effectively banned cameras from all Federal Courts, although the individual states were left free to regulate their own court systems. The Florida Supreme Court originally adopted the Canon in an order entered on January 27, 1941. See, "Judicial Canon 35: Revise or Retain," 37 Fla.B.J. 16 (1963).

Despite the ABA position announced in 1937, several states in reported decisions declined to follow a per se rule[20]. In

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20. See, Goldman, 10 S.W.Nev.L.R. 2001, at 2014-2020.

1956, the Colorado Supreme Court held several days of public hearings to consider whether the canon excluding still and electronic media from the courtroom should be continued, revoked or modified. In re Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (Colo. 1956). Chief Justice Moore candidly admitted that his initial position was against television and other cameras. Id. at 468. However, after six days of testimony and expert demonstrations, Justice Moore overcame his expressed bias. He concluded that the premise of Canon 35, which assumed that camera, radio and television instruments inherently interfere with the administration of justice, was utterly unfounded. Reiterating, the Chief Justice commented that the hearing "proved conclusively that the assumption of facts as stated in the Canon is wholly without support in reality," and that each of the arguments submitted in

support of the prohibition were faulty. Id. at 468. The Colorado Supreme Court addressed and rejected some of the arguments for a per se rule thus:

> "It is claimed that permitting photographs, newsreels, radio and telecasts of court proceedings amounts to entering the field of entertainment and is not strictly within the field covered by the term 'freedom of the press.' The Supreme Court of the United States has held otherwise. [Citing] the opinion in Winters v. People of Sttae of New York, 333 U.S. 507, 68 S.Ct. 665, 667, 92 L.Ed. 840,
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> * * *
>
> "Closely related to the foregoing is the argument that coverage of court proceedings going beyond the inaccurate word pictures pained with the pen of the courtroom press reporter, would be merely to satisfy "idle curiosity" for entertainment purposes. The contention overlooks the obvious fact that under our concept of government there is a constant regard for the necessity of educating and informing our people concerning the proper functioning of all three branches of government. <u>There is no field of governmental activity concerning which the people are as poorly informed as the field occupied by the judiciary</u>.
>
> "It is highly inconsistent to complain of the ignorance and apathy of voters and then to 'close the windows of information through which they might observe and learn.'"
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> . . .

> "It is contended, usually orally and in smothered words or whispers, that some trial judges, and lawyers 'who are hungry for publicity, will conclude that they are actors, and by some psychological motivation 'play to the galleries' and so conduct themselves as to satisfy their own vanity, or otherwise exploit themselves.'
>
> Any judge or lawyer who so demeans himself before a camera does not change his inherent characteristics for that particular occasion. A "show-off" or a "strutter" will be just that whether a camera is present or not."

296 P.2d at 469.

See also, Hall, J., "Colorado's Six Years Experience Without Judicial Canon 35," 48 A.B.A.J. 1120 (1962). Justice Hall of the Colorado Supreme explained the actual experience of Colorado with televised trials noting the sensational murder trial of John Graham, who bombed an airliner:

> "One may view and hear this telecast without a consciousness of degradation or distraction——for certainly it gives a true picture of the persons and things viewed and a true record of the voices and sounds. Truth is not per se objectionable. One can find nothing (and I have heard of nothing) indicating that there was a particle of detraction from the essential dignity of the proceedings. Nothing appears therein to indicate that any

> witness was distracted in giving testimony——no witness has been heard to complain. Did this telecast degrade the court? Those participating in the proceedings might well demand proof of such charges. The visual and auditory recording speaks the truth: it shows a competent judge and prosecuting attorney; competent defense counsel; witnesses; and a jury charged with a frightening task, all concerned with their public duties in an orderly, dignified, efficient and legal manner. Did it create misconceptions with respect to the court? Only true conceptions could arise from viewing the telecast. If misconceptions arose, they had their root in other sources. the telecast spoke the truth. "[Emphasis added].
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> 48 A.B.A.J. 1120 at 1121.

In Lyles v. State, 330 P.2d 734 (Okla. 1958), the Court of Appeals affirmed a burglary conviction against a claim that the trial judge had abused his discretion in permitting a television camera in the courtroom over the defendant's objection. Id. at 738-744. Specifically, the Lyles court rejected the defendant's contention that a television camera interfered with and degraded court proceedings:

> "Our experience is that when properly supervised by this court, there is neither disturbance, distraction, nor lack of dignity or decorum."
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> 330 P.2d at 742.

The Lyles Court directly rejected the defendants rank speculation as to error as:

> "[B]aseless boogey constructed out of pure conjecture. . . [T]he presumption upon which Canon 35 has been constructed is fabricated out of sheer implication and not hammered on the anvil of experience." Id.

With respect to potential abuses the Lyles Court correctly observed:

> "[W]hen abuses of discretion [of the trial court] occur, we will meet them on appeal and not in a manner of preconception and on a basis of unrealistic presumption."
>
> Id. at 745.

Finally, mirroring the deep concern of the Colorado Supreme Court, the Lyles Court also opined:

> "All too long the public concept of courtroom proceedings and demeanor has been the antiquated or distorted motion picture portrayals. It is time the people were shown the truth about their courts. How can the people have respect

> for that branch of government concerning which they grope in ignorance and the only knowledge they possess about it is based on distortions and misrepresentations?"

Id. at 743.

Similarly, in State v. Langley, 214 Ore. 445, 323 P.2d 301 (Ore. 1958), the court admonished a trial judge for allowing still and movie cameras in the courtroom in derogation of Canons 34 and 35. Nevertheless, the denial of defendant's motion for a new trial based on alleged prejudice was held not to be reversible error. It was noted that the question of the permissibility of photographers in court "cannot be determined as one either of constitutional law or of policy" but rather whether the jury was influenced adversely. 323 P.2d at 320.

This Court has rendered only two decisions, where a television camera was present, Stroble v. California 343 U.S. 181 (1952) and Estes v. Texas, 381 U.S. 532

(1965). In Stroble the defendant was convicted of a sensational rape/murder of a young child. See, People v. Stroble, 36 Cal.2d 615, 226 P.2d 330 (1951). The crime, arrest, and trial generated a great deal of sensationalized newspaper, radio, and television publicity with the district attorney releasing "play-by-play" press releases. The California Legislature was convened in special session by the governor and it held committee hearings in various parts of California to study the problems of sex crimes. The defendant unsuccessfully contended, in the trial court, that he could not receive a fair trial due to the prejudicial publicity that had created a "lynch atmosphere." He also objected, at various times, to the presence of television and still photography cameras in the courtroom. The California Supreme Court rejected the defendant's claims, observing that:

> "It seems that the traditional concept of the 'American way of the conduct of a trial,' particularly a trial for a sordid criminal offense such as that of defendant, includes both the aspects mentioned so understandingly by Mr. Hill: on the one hand over-stimulation, by mass media of communication, of the usual public interest in that which is gruesome; on the other hand a trial by a judge and jury immune from the public passion. General denunciations of the journalistic sensationalism which customarily surrounds a trial such as that of defendant, and which did surround defendant's trial, do not solve the question whether defendant's trial was fair. We may agree with defendant that it was improper for the district attorney to issue 'play-by-play bulletins' during the course of defendant's confession. But there is no indication that the jury, two months after the improper statements were made and immediately after hearing evidence, based their verdict on the newspaper accounts of the statements rather than upon the evidence. We can also assume that it was improper to allow the taking of news photographs or televising of scenes in the courtroom; but there is no indication that the jury's verdict was influenced by the taking of the pictures or the televising of courtroom scenes." [Emphasis added].
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> 226 P.2d at 334.

The United States Supreme Court affirmed the defendants conviction in Stroble v.

California, 343 U.S. 181 (1952)[21]. The majority did not grant this camera contention any recognition but Justice Frankfurter discussed it in his dissenting opinion. 343 U.S. at 200.

In Estes, Justice Clark writing for the plurality[22] noted that the petitioner, "does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but

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[21] Directly relevant to the case at bar and the discussion at the "First Issue" above, Stroble was cited with approval in Estes v. Texas, 381 U.S. 532, 541 (1965) and Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 722 (1976); although the pre-trial and trial publicity and not a camera issue was discussed. The Chief Justice, in Nebraska Press, expressed the majority's view by describing the Stroble decision as holding "that petitioner had failed to demonstrate a denial of due process." 427 U.S. at 554. [Emphasis added].

[22] Justice Clark was joined by Justices Warren, Douglas and Goldberg. Justice Harlan, concured in this opinion subject to the reservations and to the extent indicated in his concurring opinion. The Chief Justice, with Justices Douglas and Goldberg, also filed a separate opinion expressing the view that cameras in the

only that the time-honored principles of a fair trial were not followed in his case." The Court characterized the issue:

> "[T]he question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment." [23]

381 U.S. at 535.

The defendant, Estes, was a much-publicized financier indicted for obtaining property through false pretenses. Id. at 552. Massive pretrial publicity (totalling eleven volumes of press clippings) required a change of venue. Id. at 535. The initial hearings in September of 1962 were carried live by both radio and television[24]. Justice Clark, who delivered

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[22](cont'd.) state courtrooms violated the Fourteenth Amendment, U.S. Constitution. 381 U.S. at 565.

[23]Canon 28 of the State Bar of Texas left the presence of cameras to the discretion of the trial judge.

[24]Unlike the case at bar.

the plurality opinion in Estes, reviewed video-tape[25] of the pretrial hearings and commented: "[T]he picture presented was not one of that judicial serenity and calm to which petitioner was entitled." Id. at 536. The cameras at the pretrial hearings were essentially unregulated. Cables and wires were snaked across the courtroom floor, three microphones were propped up on the judge's bench and others were aimed at the jury box and counsel table. Id. at 536. As pointed out by Justice Clark, it was conceded that the activities by the media personnel, cameramen, and photographers "led to considerable disruption of pretrial hearings." Id. at 536. Apparently photographers were roaming at will and one photographer snapped a picture from behind the judge's bench. Id. at 536. At trial,

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25. The Supreme Court of Florida in rendering its opinion in Post-News was also presented with the video-tapes of the Estes trial for its consideration.

however, the cameras were confined to a booth at the rear of the courtroom. Id. at 537 and 581 (photograph); see also, Netteburg, "Does Research Support the Estes ban on Cameras in the Courtroom?" 63 Judicature 466 (1980). During the trial itself, live sound television coverage was limited to opening and closing arguments of the prosecution and the return of the jury verdict; no witnesses were photographed without their consent; the jury was sequestered and there was no supplemental lighting. 381 U.S. at 607-609 (Stewart, J. dissenting). Justice Stewart in his dissent and joined by Justices, Black, Brennan and White severely criticized the majority for elevating hypothetical complaints to levels of constitutional error and for focusing upon the essentially irrelevant pretrial hearings. 381 U.S. at 601-610. Relevant to the present circumstances Justice Stewart concluded:

> "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." [Emphasis added]. Id. at 614-615.

It is significant to note that, despite the plurality's graphic portrayal of the courtroom scenario, only three justices, Warren, Douglas, and Goldberg, would join without reservation in the opinion of Justice Clark. A bare majority of the Court was created by the concurrence of Justice Harlan, who specifically limited the Court's opinion, thus:

> "The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases... The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes not farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now." [Emphasis added]. 381 U.S. at 590-591.

Both the Court opinion and Justice Harlan further recognized the limited application of Estes. Justice Clark specially noted:

> "When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."[26] 381 U.S. at 540.

Justice Clark also concluded that:

> "It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are

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26. Technology has far exceeded the expectations of 1962 to a point where even the defendants (Br. p.38) and the most vocal critics of television in the courtroom concede television cameras are no longer "physically" obtrusive and distracting. See, Gerbner, "Trial by Television: Are We at the Point of No Return?," 63 Judicature 416 at 417 (1980); see also, Broholm, "Electronic Media in the Courtroom," May-Case and Comment 3 at p.6 (1980) (describing technology) and Brief of Amicus Curiae, Public Broadcasting System, et al. Obviously here we do have "another case" where the record is utterly devoid of the presence of the media, except for defense counsel's announcement and one cautionary warning to a cameraman outside the presence of the jury. A15.

> not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today."

Id. at 551-552.

Finally it should be also noted that Justice Brennan in a specially written opinion at the conclusion of Estes, reiterated Justice Harlan's cautionary view above, and added that:

> "Thus today's decision is not a blanket constitutional prohibition against the televising of state criminal trials." [Emphasis supplied].

381 U.S. at 617.

Indeed, Estes has not been recognized in any of this Court's opinions as a mandate precluding a camera from a courtroom. In the eight-to-one majority view in Sheppard v. Maxwell, 384 U.S. 333, 352 (1966) the court described Estes as a fact pattern in which the "totality of circumstances" produced an unconstitutional trial. The same limited reading of Estes was expressed in Murphy v. Florida, 421

U.S. 794 at 798 (1975), as, "a state court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." In Nebraska Press v. Stuart, 427 U.S. 539, 552 (1976), the Court limited Estes to its facts:

> "[I]n Estes, the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself 'inherently prevented a sober search for the truth.'" [Emphasis added].

Subsequent State Court opinions have also specifically taken the view that Estes is limited to its facts. See, Post-Newsweek, supra; Commonwealth v. Hayes, __Pa.__ 414 A.2d 318, 335 (Pa. 1980) (Kauffman, J. concurring); Willard v. State, 400 N.E.2d 151, at 157-158 (Ind. 1980)(burden is on defendant; voir dire is the measure); Great Falls Tribune v. District Court, __P.2d__(Mont. 1980); S.Ct. Case No. 79-93, opinion filed March

19, 1980; State v. Cline, 555 P.2d 724, 734 (Mont. 1976); Street v. State, 237 Ga. 307 (1976); Commonwealth v. Martin, 465 Pa. 134 (1975); State v. Schmid, 109 Ariz. 349, 509 P.2d 619, 623 (1973); Wansley v. Commonwealth, 210 Va. 462 (1970); Bradley v. Texas, 450 S.W.2d 847 at 853 (Tex,Cr.App. 1970); State v. Hagan, 24 N.Y.2d 395 (1969); Gonzales v. People, 165 Colo. 322, 438 P.2d 686 (1968). Furthermore, since February 1976 more than twenty-eight (28) states have allowed some sort of audio-visual coverage of their court proceedings. AB5-AB9; see also, Br. of Amicus Curiae RTNDA, et al., at notes 40-44. Additionally, as the amicus curiae RTNDA indicates at least twelve other states are actively studying allowing some sort of audio-visual coverage of their Courtrooms. Id., at note 44. Thirteen (13) states do not condition coverage upon the

defendant's consent[27]. Id. at note 47. The State submits that in the final analysis the ongoing efforts of the vase majority of the states, together with a proper reading of Estes and this Court's own opinions, affirmatively demonstrate the view that Estes is not a mandate against the mere presence of a camera in a courtroom. It would also appear self-evident that in the final analysis, in the face of the foregoing substantive law and the decided disregard of the states that:

> "Enacted in a time of apparent crisis, Canon 35 now appears to have been an exaggerated response to an exceptional situation."
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> Keilbowicz, 63 Judicature, 14, at 20.

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27. Colorado, it should be noted, added a consent requirement to its Canon, only in deference to the court in Estes. See, Note "Free Press-Fair Trial-Cameras in the Courtroom," 38 U.Colo.L.R. 276, at 278 (1966). The same deference resulted in one state, California, withdrawing its experimental program, when this court accepted the case herein for review. New York and Oregon have also apparently followed suit. See, Brief of RTNDA, et al., at Appendix A.

PETITION OF POST-NEWSWEEK

B. Consistent with the foregoing analysis that Estes is not a ban per se upon a camera or other electronic media in a courtroom, on May 21, 1975, the Supreme Court of Florida partially granted a petition by the Post-Newsweek stations of Florida. The stations had petitioned the court to adopt a substitute for Canon 3A(7) of the state's Code of Judicial Conduct, which required that a judge in keeping with his adjudicative responsibility, prohibit the broadcasting, televising, recording and photographing of judicial proceedings in courtroom except in certain specified circumstances. The court declined to adopt the substitute but it agreed to reexamine the canon and consider modification. See, Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976).

On January 28, 1976, the Court entered

its formal opinion, after an earlier conference attended by "all interested parties," authorizing Judge Willis, the Chief trial judge in the Second Judicial Circuit, to proceed with a televised trial under specific limited guidelines. 327 So.2d at 2. Specifically, the court's order required the consent of all of the parties, jurors and witnesses. On September 17, 1976, Judge Willis reported that he was having difficulty obtaining the required consents of the parties. The Court's order was thereupon expanded to the Ninth Judicial Circuit. 337 So. 2d 804 (Fla. 1976). Subsequently, by supplemental order the plan was expanded to the Fourth and Eighth Circuits. See, 370 So.2d at 766.

On April 7, 1977, when the consent of all participants proved to be an unworkable standard, the court addressed the issue again, concluding that a thorough

experimental program was, "essential to a reasoned decision upon the petition." 347 So.2d 402 at 403 (Fla. 1977). The Court thereupon proposed to enter upon a pilot program. Id. On May 21, 1977, an extensive conference was conducted by the Court, at which all interested parties participated. 347 So.2d 404 (Fla. 1977). On June 14, 1977, after more than two (2) years of deliberation, the court instituted a one year pilot program from 12:01 A.M. July 5, 1977 to 11:59 P.M. June 30, 1978 [28]; during which the elec-

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[28] During this period, the Defendants, Chandler and Granger were tried and convicted. The publicity surrounding their trial was negligible. See, The Miami Herald "Ham Hears Burglary, Two Officers Arrested," July 2, 1977, P. 1A; The Miami News, "Beach Policemen Charged with Burglary," July 2, 1977, P.1A; The Miami News, "Trial Date Set for Two Beach Policemen," July 20, 1977, P. 1B; The Miami Herald, "Beach Cops Staged Break-In 'as joke'," November 18, 1977. P.ID; The Miami Herald, "Radio Enthusiast Unsure of Date he Heard Cops," December 7, 1977, P.1A; The Miami Herald, "Wives of Beach Cops Testify," December 8, 1977, P. 1B.

tronic media were afforded access to Florida courtrooms under strict guidelines. See, 347 So.2d at 405-406. Relevant to the case at bar, the guidelines limited the trial of any cause to one fixed position television "minicam" and one fixed position still photographer. Id., See also, Administrative Order 79-31, presenly in effect for Courtroom 4-4, in the case at bar (AA 34 - AA 36 ); The News and The Law, "TV in Court: Seven States approve," (Dec. 1977) pp. 24-25, (Diagram of Zamora courtroom). The strict standards also excluded any artificial light sources; excluded any equipment except that examined and listed by the Court and excluded any audio pick-up of bench conferences, or between attorneys and clients. Id. All other equipment other than the one fixed "minicam" and one still photograph were restricted to a remote

location from the courtroom [29]. Id. The Florida Supreme Court specifically instructed that the trial judge was not to be presented or consulted on any media disputes; that contesting media shall be excluded and that all equipment once in place shall not be moved. Id. On May 11, 1978, the Court accelerated the briefing schedule and denied an extension of the pilot program beyond the one (1) year deadline. 358 So.2d 1360 (Fla. 1978). The remarks of Chief Justice Overton and Justice Boyd are illuminating:

"[Justice Overton]:

> I concur in provisions in the majority opinion that set forth the procedure for the presentation of all views evaluating the pilot program. I dissent on that portion of the order that denies the request to extend the pilot period until September 15, 1978. There have been no substantial problems presented

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[29] See, Tello, "The Zamora Trial Makes TV History," Lighting Dimensions (March 1978) pp 39-40 (media liaison official for Zamora trial).

to this Court with regard to the pilot program. In view of this fact, I see no justification for not extending the pilot program to a time certain within which a final opinion may be rendered by this Court."

. . .

"[Justice Boyd]:

"I further dissent to that portion of the order terminating the experiment on June 30, 1978. Responses which I have heard from judges and lawyers thus far lead me to conclude that the public will be beneficially affected by continuing the program indefinitely pending review by this Court. After one calendar year judges, lawyers, jurors, witnesses, news reporters and the viewing public have grown accustomed to cameras in court. The temporary termination of such activity, with the probability of its renewal within a few weeks, would tend to disrupt and frustrate the program which at this time appears to be generally accepted in this State." [Emphasis added]

Id., at 1361-1362.

On April 12, 1979, the Court in Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), held inter alia, (1) that electronic media coverage of courtroom proceedings is not per se a denial of due process; (2) that subject to the express modification of

Florida Judicial Canon 3A(7) and the attached guidelines, camera coverage would be allowed; and (3) that the order of the Court was not pursuant to the First Amendment, but was based upon the administrative and supervisory powers of the Court. The decision of the Court was only made after extensive examination of Estes and Stroble, supra, and due consideration of the present state of the issue[30]. See, 370 So.2d at 766 (thousands of comments, reports and exhibits considered). The Supreme Court of Florida observed that in Justice Harlan's view in Estes, further experimentation by the states was neces-

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[30]The State submits that the proper issue herein is only whether Chandler and Granger received a fair trial on this record. However, inasmuch as both the defendants and the Amicus Curiae on behalf of the defendants make substantial incomplete references to the record in Post-Newsweek, the State has by motion obtained the permission of the Supreme Court of Florida to lodge said record with this Court, subject to the Court's approval.

sary; that the Estes Court acknowledged that advances in technology could make a new case; that in the Estes case twelve (12) cameras were in use at one point in the proceeding; that Justice Clark declined to enshrine Canon 35 in the Fourteenth Amendment; that eighteen (18) states were pursuing either a permanent or experimental rule permitting media in the courts, and finally that recent decisions of the court in Sheppard, Nebraska Press and Murphy v. Florida, limit Estes to its facts. See, 370 So.2d at 771-773. As demonstrated in the discussion above the Florida Supreme Court's reasoning is sound.

In considering the record before it, the Florida Supreme Court addressed several aspects of the Post-Newsweek record: 1.) a survey conducted the Judicial Planning Coordination Unit of the Office of the State Courts Administrator (here-

inafter, "the survey") [31]; 2.) a survey and report by the Florida Conference of Circuit Judges, and 3.) reports of actual trials, including an extensive report by Judge Paul Baker regarding the Zamora trial [32], 270 So.2d at 766-770, 775 n. 48. The Defendants attempt in post hoc fashion to attack their own conviction by relying almost exclusively upon an extensive attack upon "the survey." The Defendants, accuse the Supreme Court of Florida of acting "so cavalierly" (Br. P57); claim that the survey "reeked of

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[31] The Defendants made extensive partial reference to the survey, which is correctly titled: "A Sample Survey of the Attitudes of Individuals Associated With Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978.

For the convenience of the Court, the State has provided the factual data of the entire survey in its Appendix at AA37 - AA69.

[32] The entire text of Judge Baker's report is contained in the State's Appendix at AA1 - AA33.

personal guess-work" (Br. p. 49) and finally claim that the survey is "in house" and "hardly scientific" (Br. pp. 47-48). First of all, the State submits that "the survey" was not the sole and motivating basis for the Supreme Court's decision as clearly reflected in the opinion in Post-Newsweek. Secondly, the Court itself expressly recognized that the survey was not scientific:

> "Mindful that the survey results are non-scientific and reflect only the respondents' attitudes and perceptions about the presence of electronic media in the courtroom, nonetheless, the results do provide some general indications:"
>
> 370 So.2d at 768.

While extensive reference to the Court's observations are impractical here, certain of the findings are particularly illuminating:

> "(1)Presence of the electronic media in the courtroom had little effect upon respondents' perception of the judiciary and the dignity of the proceedings.
>
> . . .

"(4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected.

. . .

"(8) The distracting effect of electronic media was deemed to range from almost not at all for jurors, to slightly for witnesses and attorneys.

. . .

"(15) Court personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly.

"(16) They also felt that the witnesses were slightly inhibited by the presence of electronic media and that jurors were made slightly self-conscious, nervous, and distracted, but also slightly more attentive." [Footnotes omitted].

Id., at 768-769.

The court concluded that:

"From our own experience with electronic coverage of oral arguments before this Court during the pilot program we found absolutely no adverse effect upon the participants' performance or the decorum of the proceedings."

Id., at 769.

Sub Judice, the Defendants attempt to

distort the survey by combining entire sections of figures and reordering the responses. See, Brief of Amicus Curiae Post-Newsweek. The control questions in the survey and the entire survey itself refute the attempt of the Defendants by manipulation to disprove that which the figures plainly show.

With respect to the Florida Conference of Circuit Judges, which submitted a recommendation that Canon 3A(7) not be changed, the Court perceived that the opposition was more traditional rather than of substance:

> "The circuit judge under whose direction the survey was administered reported that "the neutrals generally made favorable comments as 'I am neutral but the press were professional, no disturbances, etc.'" In response to questions 6, 7, and 8 of the survey, it was the reaction of the circuit judges (90 to95%) that jurors, witnesses, and lawyers were not affected in the performance of their sworn duty by the presence of electronic media." [Footnotes omitted].

Id., at 769-770.

The court also substantiated its view, noting the conclusion of the survey:

> "As stated by Circuit Judge Arthur J. Franza in his survey recapitulation and analysis:
>
> From the whole, I think Courts do not object to use of cameras in the courtroom now that they have had some experience. However, in certain areas some Judges have strong opinions. Paramount being:
>
> 1. That the presiding Judge have control of his courtroom.
>
> 2. That confidential or undercover agents who are witnesses, victims of crimes, family especially children of the convicted, and juvenile proceedings not be photographed." [Footnote ommitted][33].

The Defendants' criticism of Post-Newsweek relying upon the Conference of Circuit Judges Report is indeed a hollow argument.

In the final analysis, actual experience was the substantive basis of the well-reasoned opinion in Post-Newsweek and

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[33] The Supreme Court of Florida concurred in these concerns. See, 370 So.2d 778-779. The State would also vigorously support these concerns. See, discussion at footnote 16, supra, see also, Richmond Newspapers, (Blackmun, J. concurring).

is the overwhelming and compelling reason to permit electronic media access to trial courtrooms. See, also, "Report to the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom", (April 1, 1979), (referring at pp. 26, 19, 30 and Appendix I, that jurors were not distracted, nor did a camera's presence have any affect upon their functioning as jurors) hereinafter the "Wisconsin report"[34]; Goldman 10 S.W. Nev.L.R. 2001, at 2014-2059 (Soleranzo experiment in Nevada: jury foreman states that filming of trial had no effect upon jury); Humphries, "Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom,"

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[34]. The Wisconsin, Louisiana and Washington Reports have been lodged with the Court by the Amicus Curiae, Wisconsin et al. whose brief also contains a thorough analysis which the State commends to this Court, of the experience of Wisconsin as compared to Florida, Nevada, Louisiana, Georgia, Alabama, Washington, New York and Colorado.

pp. 2,3 (undated)(Louisiana Study: jurors unaffected by presence of camera and did not attach more importance to case); "Washington Bench-Bar-Press Committee, Report of SubCommittee on Canon 35" p. 33 April 5, 1975) [hereinafter the Washington Report]; Netteberg, 63 Judicature 467 at 467-472. In the four (4) areas of particular concern to the Estes court, physical disruption; psychological effect; exploitation of the courts[35]. and prejudical publicity; the Court found no evidence in its experience to

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35. Commercial exploitation of the courts is a hollow argument in view of the advent of the Public Broadcasting System, a result that the Estes Court could not have foreseen. In Florida substantially all trials have been carried exclusively by PBS with other stations using footage. See, Brief of P.B.S., et al. These trials and excerpts only constitute a handful of the more than 24,000 trials in Metropolitan Dade County in 1979 alone. This underscores a final point: -- the media are not clamoring at the courtroom door to get in. They too are severely constrained by time and other audience interests. See, Brief of Post-Newsweek.

support the fears expressed. Id., at 775-777; see also, e.g., Wisconsin Report; Hall, 48 A.B.A.J. 1120 at 1121; Goldman, 10 S.W. Nev.L.R. 2201; Netteburg, "Does Research Support the Estes ban on Cameras in the Courtroom?" 63 Judicature 466 (1980). With respect to physical disturbances, the Court explained that:

> "After sifting through the voluminous arguments, comments, survey results, and concessions of the opponents, it is apparent that through application and enforcement of the standards imposed by the Court during the pilot program, physical disturbance was so minimal as not to be an arguable factor." [Emphasis added, Footnotes Omitted].
>
> Id., at 775.

The trial courts also reported no instances of being "burdened" by the presence of electronic media. Id. With respect to decorum, the Court observed:

> "A related issue is whether the very presence of electronic media in the courtroom detracts from the decorum of the proceedings. The attitudes of

> all participants surveyed clearly indicate that there is no such discernible effect."

Id.

As the Estes Court envisioned, the advances in technology have clearly produced "another case" [36]. Although the Defendants concede this issue, the State would specially emphasize that the lack of physical intrusiveness of a camera is an important factor. The simple reason is that where the camera is so physically minimally intrusive, "as not to be an arguable factor," as a matter of common sense, the so called "psychological distraction," attributable to the camera must be substantially nil. See, Wilson "Justice in Living Color," 60 A.B.A.J.

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[36] In addition to other technological advancements, (See, Broholm, "Case and Comment, supra; Brief of P.B.S., et al), the state would also note that the "tell-tale red lights" noted in Estes, 381 U.S. at 546, are not present in Florida courtrooms using the equipment designated. See, Baker Report, at AA19; See also, Report of Channel 2 [Post-Newsweek Record].

294 at 296 (1974) ("psychological consciousness" soon forgotten when camera is not obtrusive); Geis, "Canon 35 in the Light of Recent Events," 43 A.B.A.J. 420 (1957). (In Waco, Texas trial "coughing in spectator section " was more distracting than cameras); Netteburg, 63 Judicature 466 at 470 (Witnesses in Wisconsin study more nervous about responding to attorneys than cameras; soon forgot about camera's presence; perception of camera no different than other media). A salient point, which the undersigned submits we all miss as legal scholars and trial wizards, is that for the jurors and witnesses, the entire spectrum of a legal proceeding from the columns of mahogany and the frescos behind the judge, to the pecking or dictating-cone-to-face of the court reporter, is both new and physically and psychologically distracting. Only the attorneys and the judge may

know that the camera is something different. A poignant example of that misconception is demonstrated in the Washington Report, where, when asked if they were distracted, many jurors indicated that they didn't know that the camera was something unusual in the courtroom. In the Wisconsin Report, the jurors also indicated that they were too absorbed in the trial and listening to the testimony to pay any attention to being televised.

Similarly, in examining claims that lawyers would "grandstand;" that judges would "posture;" that witnesses and jurors would somehow be affected and that the response of the media would prevent an objective and dispassionate presentation and determination the Court concluded that:

> "These are concerns that any fair minded person would share because they would, certainly in combination, be antithetical to a fair trial. The fact remains, however, that the assertions are but assumptions unsupported

> by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would appear to refute the assumptions. The Survey reflects that the assumed influences upon participants during the experimental period were perceived to vary in degree from not at all to slightly. More importantly, there was no significant difference in the presence or degree to these influences as between the electronic and print media.
>
> . . .
>
> "With particular reference to the charge of an inflated appearance of newsworthiness created by the presence of the electronic media in the courtroom, it must be recognized that newsworthy trials are newsworthy trials, and that they will be extensively covered by the media both within and without the courtroom whether Canon 3A(7) is modified or not. Consequently if it is deemed to be to the public advantage to permit electronic media coverage in the courtroom, it seems inappropriate to be dissuaded by honestly perceived but unsubstantiated concerns as to adverse psychological effects on participants." [Emphasis added].

Moreover, in the reported experience of Judge Baker and the Zamora trial, Judge Baker found, contrary to Estes, that the overall press conduct was reasonable; that the intense publicity affected the jury

not at all, that the camera presence did not affect the jurors in performing their duty as jurors and that witnesses were unaffected by the presence of a television camera. AA5-AA12; AA21-27. In summary, Judge Baker concluded that there was no discernible difference in the Zamora trial, with respect to the Court, as to whether the trial was observed by spectators in the courtroom or spectators viewing the courtroom on television. AA22-AA23.

The Defendants and the amicus, California Public Defender, et al., attempt to disparage all the foregoing, by reference to the riots in Miami, Florida, on May 17-21, 1980, the "McDuffie" case riots [37]. The argument is poorly conceived. If

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[37] A misnomer attached by the media to the case, State v. Diggs, et al. 11th Cir., Case No. 79-21601, relating to the victim, "McDuffie," who dies after a high speed chase and beating by police officers.

there was any fault on the part of the media for the May riots, it was accomplished many months prior to the riots[38]. A camera in a Tampa courtroom had nothing whatsoever to do with the circumstance, except to physically report the truth of the matter, that the police officers were

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38. The infection of a "black versus white" issue occurred many months earlier in media reports of McDuffie's death, see e.g., The Miami Herald, "Five Officers Charged in Slaying," December 29, 1979, p.1A, where twelve (12) days after McDuffie's death, in the opening paragraphs the case was for the first time characterized:

> "Three of the policemen laughed and smiled as they were booked into Dade County Jail on manslaughter charges in the beating death of 33-year-old insurance executive Arthur McDuffie . . . .
>
> "The officers, all white, worked the midnight shift in Metro's predominantly black Central District. McDuffie, a former Marine and the father of three children was black." [Emphasis added].

The causes of the May riots may have been totally unrelated to any black versus white issue or McDuffie's death. See e.g., The Miami Herald, "Survey Reveals Unprecedented Black Bitterness," June 22, 1980, p.1A; 23A

acquitted[39]. See Hallom "Some Object Lessons on Publicity in Criminal Trials," 24 Minn. L.R. 453 at 462 (1940) (noting that in Hauptman, the case had been totally infected in the printed press long before trial); see also, Goldman, 10 S.W. Nev. L.R. 2001 at 2012, n. 70-71 (duscussing fatal infection of pretrial media coverage of Sheppard v. Maxwell); see also, remarks of Justice Hall, S.Ct. of Colo. 48 A.B.A.J. 1120 at 1121 ("the telecast spoke the truth"). Furthermore, the Defendants also ignore the fact that the defendants in State v. Diggs, were acquitted. Certainly that result is totally anomalous in the face of an argument that cameras inflame the jury and incite unjust convictions. Additionally, if the entire trial had been broadcast back to Miami from Tampa, the people

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39. The trial was not viewed in Miami.

could have seen the system working instead of just the result. The people would have seen the intense cross-examination by excellent defense lawyers; the problems of an immunized witness, who may have participated in the crime; and the very credible testimony of Marrero, who was alleged to have delivered the fatal blow. There would have been less violence or none at all if all, if the public were not ignorant of the workings of their own court system[40]. See, Richmond Newspapers 48 U.S.L.W. at 5012 (the crucial need for a "community catharsis" and, "the fundamental, natural yearning to see justice done," [emphasis added] are the elemental reasons requiring a public trial); cf., also, In Re Oliver, 333 U.S. 256 (1948).

Recognized in the final analysis in

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40. See also, analysis of so called "McDuffie" riots and other recent televised and untelevised trials at Section "IV C" of Brief of Post-Newsweek, et.al.

Post-Newsweek is a vital need to reeducate the people, as to their own judicial system. See 370 So.2d at 780; see also, e.g., In Re Hearings Concerning Canon 35, supra; Commonwealth v. Hayes, __Pa.__, 414 A2d 318, 337 (1980) (Kauffman, J. concurring); Weinstein, "Let the People Observe their Courts," 61 Judicature 156 (1977); cf., Richmond Newspapers. The Chief Justice of Alabama in observing a need for electronic media in Alabama courts has similarly concluded:

> "There is no field of governmental activity about which the people are so poorly informed as the judicial branch. It is highly inconsistent to complain of the ignorance and apathy of the people concerning the judiciary, and then to close the windows of information through which they might observe and learn."
>
> "Fair Trial v. Free Press: Time for a Rehearing?" 61 Judicature 154 (1977).

See also, Miller, "Should Canon 35 be Amended?" 42 A.B.A.J. 834 at 892 (1956). A camera in a courtroom as a "surrogate"

of the public's right to know, cannot therefore be reasonably said to be an "irrelevant" or "extraneous" element of trial court proceedings[41]. See, Richmond Newspapers.

Finally, although this is not a "sunshine" issue, the Florida commitment to open government is substantially analogous. See 370 So.2d at 780; see also, Ch. 119, Fla.Stat. (1977); § 286.011, Fla.Stat., (open public meetings law); cf., Article II §§ 8(a) and (b), Fla.Const. Electronic media coverage exists at all levels of public life in Florida[42]. See, also,

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[41] The derogatory suggestion of the Amicus, California Public Defender et al., (Br. at p.25) that the efforts, policy and analysis of the Florida Supreme Court in Post-Newsweek, is nothing more than a "public relations stunt" to "improve the image of the judges" is purely scandalous. See, Sterns and Gressman, Supreme Court Practice §13.11 at 720 (5th Ed. 1978).

[42] The perception of television has changed substantially since Estes. It is no longer new, but rather is accepted

Brief of Post-Newsweek, et.al. The people of Florida are accustomed to a "minicam" at school board meetings; city council proceedings; county commission hearings; administrative hearings; in the Legislature[43]. and in many other public and governmental gatherings. The presence

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[42]. (cont.) as a function of modern mass communication and the daily living experience, together with the morning and evening newspaper. See, Roper Organization Inc., "Public Perceptions of Television and Other Mass Media: A Twenty Year Review, (1958-1978)" (April, 1979).

[43]. The United States House of Representatives has approved and relied upon the long standing experience of the Florida Legislature, in developing its own approach to televising its proceedings. See, "Broadcasting the Proceedings of the House: A report of the Committee on Rules on its study of Alternative Methods of Providing Complete and Unedited Audio and Visual Broadcasting of the Proceedings of the House of Representatives, Pursuant to Section 3 of the House Resolution 866 Ninety-Fifth Congress together with Supplemental Authority, Dissenting and Minority Views," 95th Cong. 2d Sess. (February 15, 1978), at pp 39-45; and 56-59 (noting that Florida and forty-four (44) other states permit televised coverage of their legislative floor proceedings).

of a television camera simply does not have the novelty or psychological impact that it might have had during the Estes trial eighteen (18) years ago.

In the final analysis, the presence of the media, electronic or otherwise, at public meetings in Florida and in Florida's courtrooms is part of Florida's commitment to open government and the public's right to know. Concurrent with that concept, Mr. Chief Justice Burger succinctly stated in Richmond Newspapers:

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what ehty are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings..."
>
> 48 U.S.L.W. at 5012.

See also, Estes v. Texas, 381 U.S. at

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43. (cont.) The parade of horribles marched out against Legislative coverage in Florida have also not materialized.

615-616 (White, J. dissenting). An uncannily parellel observation preceding the Chief Justice's remarks, was also precisely the rationale in Post-Newsweek:

> "In reaching our conclusion we are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government. A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings. [Emphasis added].

Id. at 781

Where the "state action" herein has so clearly a "rational basis," this Honorable Court should not disturb that result. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, 421-422 (1974).

The Defendants' argument that the cameras are psychologically distracting, was probably also the same argument made when court reporters with their machines

replaced quill writers. The actual experience of Florida and other states refutes the argument[44]. Moreover, it is wholly apparent that substantial and carefully considered guidelines have been established and enforced in Florida, Wisconsin and other states, which clearly protect the Defendants' superior right to a fair trial. Cf., Green v. State, 377 So.2d 193 (Fla.3dDCA 1979). From the foregoing analysis, the Defendants' arbitrary assertion that it is okay if some of the people have the opportunity to see their trial, but unconstitutional if all of the people have the opportunity to see their trial, must be rejected.

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44. See, e.g., Simonberg, "TV in Court" The Wide World of Torts," Juris Doctor 41, at 44 (April, 1979) (Colorado in twenty (20) years has never had a trial declared constitutionally unfair because of the mere presence of a television camera); State ex rel. Grinnel Communications Corp. v. Love, 62 Ohio St.2d (June 18, 1980) (there is no per se prohibition against electronic media).

Third Issue

IN THE TOTAL ABSENCE OF A CLEAR AND OVERRIDING FEDERAL INTEREST, THIS HONORABLE COURT SHOULD NOT INTERFERE WITH THE ADMINISTRATION OF THE STATE COURT JUDICIARY.

The final argument herein is also an integral part of the first argument. As noted above, at the "First Issue," there is simply no demonstration on this record of any prejudice whatsoever to these Defendants. Furthermore, the Florida Supreme Court exercised its authority herein not as a matter of constitutional interpretation, but rather pursuant to its inherent supervisory authority over all Florida state courts. 370 So.2d at 794.

Where a defendant fails to demonstrate any prejudice from state action, this Court has not hesitated to also conclude that no compelling federal question warrants, intrusion into the state court procedure. See e.g., County Court of Ulster County New York v. Allen, __U.S.__, 99 S.Ct. 2213

(1979); Wainwright v. Sykes, 433 U.S. 72 (1977); Henderson v. Kibbe, 431 U.S. 145 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Murphy v. Florida, 421 U.S. 794 (1975); Broaderick v. Oklahoma, 413 U.S. 601 (1973); Williams v. Florida, 399 U.S. 117 (1970); Spencer v. Texas, 385 U.S. 554 (1967); Beck v. Washington, 369 U.S. 541 (1952); see also, considerations in, Stone v. Powell, 428 U.S. 465 (1976); Oshea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971); Railroad Commission v. Pullman Company, 312 U.S. 496 (1941); cf., Nixon v. Warner Communications, Inc., 435 U.S. 589, 614 (1978)(Stevens, J. dissenting: "Only an egregious abuse of discretion should merit reversal...[A]ppellate courts should observe with respect...a trial court's exercise of discretion concerning its own housekeeping practices"), In Whalen v. Roe, Mr. Justice Stevens explained the underlying doctrine herein upon which

the convictions and the state action below should be sustained:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be frought with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold. [Citing: New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931)(Brandeis, J. dissenting)]."
>
> 429 U.S. 589 at 597, n.20.

Guided by "the light of reason" even Mr. Justice Harlan recognized, while he limited Estes to its facts, that:

> "The question is frought with unusual difficulties. Permitting tele-

> vision in the courtroom undeniably has mischievous potentialities . . . Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." [Emphasis added]. 381 U.S. at 587.

Cf. also, Spencer v. Texas, 385 U.S. 554, 559-569 (1967) (Harlan, J.); Estes, 381 U.S. at 614-615 (Stewart, J., joined by Black, J., Brennan, J., and White, J., dissenting). Justice Harlan's final conclusions also are directly relevant herein:

> "[W]e should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to reexamination in accordance with the traditional workings of the Due Process Clause." [Emphasis added]. Id. at 595-596.

It is wholly apparent from the actual experience of Florida and Wisconsin, and

other states (see also, Amicus Curiae breifs of RTNDA, et al.; Wisconsin, et al. and Post-Newsweek, et al.), that the visionary remarks of Justice Harlan have been borne out. The various concerns of the Estes court with multiple aspects of physical disruption; psychological disruption; exploitation; possible effects upon witnesses and jurors and abuse by the press[45]. have not been realized. See also, e.g., brief of Wisconsin, et al., point "III". The substantial fears of opponents of a camera in a courtroom are completely

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[45]. The Supreme Court of Florida has expressly reserved a warning to the media:

> "Proponents represent, and we accept in good faith that this type of sensational and uncomplimentary coverage will be displaced by the sort of orderly and dignified in-court coverage demonstrated during the pilot program." [Emphasis added]. 370 So.2d at 781.

A violation of such 'good faith' would justify an appropriate response of partial closure. See, Richmond Newspapers; see also, Stephenson, "Fair-Trial-Free Press: Rights in Continuing Conflict" 46 Brooklyn L.R. 38 (1979)(necessity of guidelines).

dispelled by actual experience[46]. While in 1962 only two (2) states permitted cameras, now more than twenty-eight (28) states have experience with electronic media. Cf., the considerations in, McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971); Leland v. Oregon, 343 U.S. 790, 798 (1952). The State submits that in the case at bar, "[w]here there is no disruption of the 'essential requirement of fair and orderly administration of justice,' freedom of discussion should be given its widest range" [quoting Estes v. Texas, 381 U.S. at 615 (Stewart, J., dissenting)], and this Court should not interfere with the "laboratory" of the states. See also, Richmond Newspapers; Brief of Amicus Curiae, Conference of Chief Justices.

46. See, Aspen, 67 Illinois B.J. 82 (1978)(explaining negative attitude of Illinois Bar Members totally dispelled by actual observation of Zamora trial; further experimentation should be undertaken); see also, Netteburg, 63 Judicature 467 (1980).

## VII.

## CONCLUSION

The well-reasoned analysis and policy of the Florida Supreme Court is based upon cautious guidelines and actual experience. The accused's right to a public trial, which the public is permitted the opportunity to observe, is the very foundation of the justice system. Ironically, a proper historical analysis of the institution of the public trial binds us not to the past, but establishes the freedom of the future. This Honorable Court should therefore leave unfettered the diverse experience of the states and affirm the Florida Rule and the judgment and conviction below.

RESPECTFULLY SUBMITTED, on the eighteenth day of August, 1980, at Miami, Florida.

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Supreme Court, U. S.
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CASE NO. 79-1260

in the

# Supreme Court
of the
# United States

OCTOBER TERM, 1979

Noel Chandler and Robert Granger,

*Appellants,*

*vs.*

State of Florida,

*Appellee.*

**On Appeal from the Supreme Court of Florida**

## REPLY BRIEF OF APPELLENTS

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November 3, 1980

## QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

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CASE NO. 79-1260

in the

# Supreme Court of the United States

OCTOBER TERM, 1979

Noel Chandler and Robert Granger,

*Appellants,*

*vs.*

State of Florida,

*Appellee.*

**On Appeal from the Supreme Court of Florida**

## REPLY BRIEF OF APPELLANTS

## ARGUMENT

### I.

### THE SIXTH AMENDMENT GUARANTEES *THE ACCUSED* THE RIGHT TO A PUBLIC TRIAL.

Neither the Appellee nor any of the many *Amici* directly addressed this issue, relying instead on oblique references to, and incorrect interpretations of, the various opinions of the Court in *Richmond Newspapers, Inc. v. Virginia,* ____ U.S. ____, 100 S.Ct. 2814 (1980), for the proposition that the Sixth Amendment guarantee of the right to a public trial belongs to the media and the public in general. In fact, Mr. Chief Justice Burger made it clear that ". . . throughout its evolution, the trial has been open to all who *cared* to observe." *Id.*, at 2821 [emphasis added]; and, that *Richmond Newspapers, Inc., supra,* presented for the first time the question of whether closure of a trial is proper where there is no demonstration of the need to close the courtroom in order ". . . to protect the defendant's *superior* right to a fair trial." *Id.*, at 2821 [emphasis added]. Mr. Justice Stevens' concurring opinion in *Richmond Newspapers, Inc.* arrived at the same conclusion: ". . . the Framers quite properly identified the party who has the greatest interest in the right to a public trial." *Id.*, 100 S.Ct. at 2831, n. 2.

In short, the Court's decision in *Richmond Newspapers, Inc.* did not, in any way, depreciate the quality and integrity of the Sixth Amendment's guarantee of a public trial for the benefit of the accused.

### II.

### THE MEDIA'S RIGHT TO ACCESS TO THE COURTROOM IS NO GREATER THAN THE PUBLIC'S RIGHT, IN GENERAL.

All *Amici* and the State of Florida argue that:

1. *Richmond Newspapers, Inc., supra,* has created a right of access to the courtroom which is superior to that of the public in general;

2. Appellants seek to "close" the courtroom to the public (and media) in general; and

3. The media is the great "surrogate" for all persons and all purposes.

None of the above contentions is valid.

As previously indicated, *Richmond Newspapers, Inc., supra,* dealt with the arbitrary, seemingly inexplicable closure of the Courtroom, to the press and public alike, on the defendant's unopposed motion for same. *Richmond Newspapers, Inc., supra,* makes it clear that before a judge may bar the press and public from the Courtroom, there must be some demonstration of the need to protect the accused's " . . . superior right to a fair trial, or that some other overriding consideration requires closure." *Id.,* at 2821. *Sub judice* Appellants do not seek closure. The *Amici* briefs all argue that Appellants seek to bar the press in general. Nowhere in Appellants' Brief is that contention made, much less even suggested. It is almost as if *Amici* have not even read Appellants' Brief.

Messrs. Justices White and Stevens joined in the Chief Justice's opinion in *Richmond Newspapers, Inc., supra,* which concluded that the First Amendment prohibited the government from *summarily* closing the courtroom doors to the press. Appellants did not seek to bar either the public or the press. All Appellants objected to was the presence of the television cameras and the still photographer. Had the local newspapers attempted to set up a copy desk or printing press in the courtroom, Appellants would have, likewise, objected. Unlike *Richmond Newspapers, Inc., supra,* no effort was made to bar news reporters from the courtroom. News

reporters for television, radio and newspapers were all welcome to attend the trial. Appellee and "surrogates" have done a disservice to this Court by suggesting anything to the contrary.

Appellants agree, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the *public.*" *Richmond Newspapers, Inc., supra,* 100 S.Ct. at 2830 (Burger, C.J.) [emphasis added and footnote omitted]. This is not to say, however, that the First Amendment rights of the public and the press are absolute. As pointed out by Mr. Chief Justice Burger (*Id.*, at 2830, n. 18), Mr. Justice Brennan (concurring, with whom Mr. Justice Marshall joined) (*Id.*, at 2832, n. 2) and Mr. Justice Stewart (concurring) (*Id.*, at 2840), this right of access is not without limit; it is *not* absolute.

Not content with reading, interpreting and arguing *Richmond Newspapers, Inc.* beyond recognition, the media *Amici* have the audacity to suggest that they are the ever-powerful, omnipresent force which protects the public. It is as if the Constitution of the United States and this Court did not exist. The media's claim as "surrogate" for the public is bottomed on three sentences from Mr. Chief Justice Burger's opinion in *Richmond Newspapers, Inc., supra.*[1]

These self-appointed "surrogates", however, serve their own special interests. Who "appointed" the media to act for the public? The media! While a free press may be the backbone of our system of justice, the Defendant's right to a

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[1] "Instead of acquiring information about trials by firsthand observation or word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard." (Burger, C.J.) (100 S.Ct. at 2825).

fair trial is its *life's blood.* Presumably the press could accurately report on what occurred on a particular day and in a particular courtroom without a single television camera ever poking its tunnel-vision eye into the courtroom. But, how does a wrongfully convicted defendant recover the loss of his freedom?

The "surrogates" make mighty claims and extravagant statements about all the wonderful things television has done, and can do, for the public. It is not necessary to present a "laundry list" of television's commercial and educational accomplishments. It suffices to say, promoting a fair and impartial trial for the accused is not one of those accomplishments. " . . . [T]he news media's penchant for extensively covering sensational trials"[2] is well documented. Consider, for example, *Calley v. Callaway,* 519 F.2d 184 (5th Cir. 1975); *Sheppard v. Maxwell,* 384 U.S. 333 (1966), and *Estes v. Texas,* 381 U.S. 532 (1965).[3] With "surrogates" like that, who needs enemies?

Stung by *Gannett Co., Inc. v. De Pasquale,* U.S. , 99 S.Ct. 2898 (1979), and its progeny, every time the media is barred from a pretrial hearing by a conscientious judge attempting to protect a defendant's rights to a fair trial and due process of law, the media uses its power to villify and condemn those sworn to uphold the Constitution. In Florida, (as in every state which elects its judges), a barrage of " . . . editorial denunciation [is] visited upon every trial judge who bars the Media from his courtroom", *The Miami Herald Pub. Co. v. Hon. Royce R. Lewis,* 383 So.2d 236, 244 (Fla. 4th DCA 1980) (Letts, C.J., On Petition for Rehearing), regardless of the reason and irrespective of the need to protect a litigant's rights.

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[2] *United States v. Williams,* 568 F.2d 464, 467 (5th Cir. 1978).

[3] It is significant to note that each opinion in *Richmond Newspapers, Inc.*, which made reference to *Estes, supra.*, did so in an approving manner.

The "surrogates" perceive *Richmond Newspapers, Inc., supra,* as the talisman for all that is "wrong" with our system of justice. "Access is now unlimited," they claim. They contend that the commitment to government in the "sunshine" requires unlimited access, and authorizes the televising of criminal trials regardless of the impact on the accused's right to a fair and impartial trial. Not satisfied with access rights equal to that of the public in general, the "surrogates" continue to lobby judges to "open up" the Courtrooms to their equipment.

Recently, attorney Alan B. Morrison questioned the wisdom of *this* Court's continued ban on television cameras in the courtroom and suggested that because, " . . . the [Supreme] Court sits for fewer than 40 days a term . . . [and] there are only 200 seats for the general public . . .," access could and should be increased by "a simple solution . . . televising the proceedings." "Televising Supreme Court Actions", *New York Times,* Sept. 29, 1980, §A at 19.[4] Give the "surrogates" an inch, and they'll "take a mile."

## III.

## THE MERE PRESENCE OF TELEVISION AND STILL PHOTOGRAPHIC CAMERAS DURING A CRIMINAL TRIAL IS INHERENTLY PREJUDICIAL AND DETRACTS FROM ITS BASIC PURPOSE, THUS DENYING THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The Appellee and all *Amici,* except the Conference of Chief Justices, (hereinafter referred to as "CCJ"), baldly

[4]It is interesting to observe that despite the claims of Appellee and *Amici* that televising trials and judicial proceedings generally are not "disruptive", and further, that modern television cameras are unobtrusive, neither Appellee nor the many media *Amici* have filed a motion with this court to televise the oral arguments in this case (*See,* page 9, *infra*).

assert that Appellants received a fair trial or that televised criminal trials do not operate to deny the accused his right to a fair trial.[5] No evidence, no testimony, and no sociological or psychological studies are offered in support of their position.[6] No effort is made to refute or rebut the Appellants' socio-psychological studies. The only response offered by Appellee is that Appellants failed to demonstrate the requisite level of pervasive pretrial publicity so as to be entitled to relief in this Court.

Appellee and *Amici* have missed the point. This is *not* a publicity case. This case involves the narrow but Constitutionally significant question of the effect of electronic and still media's presence on the Defendant's Sixth Amendment right when the Defendant objects to in-court coverage of his case, regardless of pretrial publicity.

### A. *Estes v. Texas*, 381 U.S. 532 (1965) Revisited.

All opposing briefs which addressed this issue concluded that *Estes, supra,* was not a mandate to bar television cameras from the courtroom. Yet, all *Amici* and the Appellee overlooked the fact that this Court, in several opinions in *Richmond Newspapers, Inc.*, cited *Estes* rather than receding from it. Appellee claims, in its Brief at 39, that Appellants ". . . made absolutely no effort, *as is their duty,* to seek less stringent remedial measures than exclusion of the camera and sequestration of the jury." Appellants have *no* such duty under either Federal or State Constitutional or Statutory

[5] *See, e.g.*: Appellee's Br. at 26-56; States' Attorneys' General's Br. at 38, (hereafter "SAG"); Columbia Broadcasting System, Inc.'s Br. at 11-21, (hereafter, "CBS"); Florida News Interests' Br. at 18-28, (hereafter "FNI"); Community Television Foundation of South Florida, Inc.'s Br. at 26-27, (hereafter "PBS"); Radio Television News Directors Association's Br. at 16-20, (hereafter "RTNDA").

[6] The words "evidence", "testimony", and "studies" are used in all opposing briefs, but as will be shown *infra*, Appellee and *Amici* are "blowing in the wind".

law. The presiding trial judge has that responsibility. The Court, not the defendant, controls the conduct of the trial. Appellee alleges in its Brief at 54 that ". . . defendants have erroneously sought an absolute right to exclude the public through its 'surrogate' the electronic media *without* any Record showing that alternatives were inadequate." Appellants are perplexed. It is clear that Appellee did not read the brief that Appellants submitted to this Court. *Nowhere,* in the trial proceedings below, did the Appellants seek to exclude the public.

*Estes, supra,* is, and remains, Appellants contend, a mandate for the proposition that when a defendant *objects* to the presence of electronic media, the equipment ought to be excluded. Appellee's Brief at 28, n. 13, is grossly inaccurate. Objections *were* raised (and overruled) to the presence of television cameras in *Diggs,*[7] and the other cases cited there. Even the Attorneys General of the sixteen States which joined in the *Amicus* Brief filed by Wisconsin Attorney General Bronson C. LaFollette, conceded that *"a trial televised with the defendant's consent raises different fair trial questions than one televised without the defendant's consent."* (SAG Br. at 8, n. 1).

Several *Amici* argue that present technology has improved, and that the state of television is such that the day envisioned by Mr. Justice Harlan in *Estes v. Texas, supra,* 381 U.S. at 595-596, and by Mr. Justice Stewart, 381 U.S. at 604, has arrived. While Appellants have conceded that *physical* disruption is not the issue *sub judice,* the fact of the matter is, human nature has not changed since 1965.

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[7]*Diggs* is the so-called "McDuffie" case which is referred to in Appellant's Br. at 51, n.28; Appellee's Br. at 102-104, and FNI's Br. at 21-22. Media is no doubt proud of its role in the aftermath of the televising of selected portions of the Diggs trial, and the seemingly inexplicable verdict. (*See,* pages 18-19, *infra*).

The "technological improvements" argument as a basis for televising criminal trials is interesting for an additional reason. Despite the extravagant claims of Appellee (Br. at 85-86), RTNDA (Br. at 7), CBS (Br. at 24) and SAG (Br. at 14-18), that the new television cameras ". . . weigh only 18 to 20 pounds, and are about one-seventh the size of the old studio camera" [used in *Estes*] (CBS Br. at 24), no *Amicus* had the temerity to file a motion in this Court to demonstrate (during oral argument) these cameras and the "state of the art." Certainly this Courtroom could unobtrusively accommodate a camera which occupies but two square feet of floor space. *Id.*, at 24.

## B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently

In response to Appellant's socio-psychological studies, Appellee refers to articles which appeared in the American Bar Association Journal. (Appellee's Br. at 98-99). Appellee also relies on a short synopsis of a paper prepared by Kermit Netteberg[8] in partial fulfillment of a doctoral degree at the University of Minnesota. The "research" was funded in part by the National Association of Broadcasters,[9] which is one of the *Amicus* on the RTNDA brief filed herein.

An analysis of the study itself, rather than the author's synopsis, indicates its lack of reliability as "evidence" for this Court. The author states unequivocally that "*research* has not shown a significant adverse impact of television on courtroom participants." *Id.*, at 469 [emphasis added, footnote omitted]. The basis for that statement is a series of articles written by media people and lawyers. The article itself is replete with *non sequiturs* and serious deficiencies in terms of "research" and "fact-finding" as those concepts are

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[8]Mr. Netteberg is currently an Assistant Professor of Journalism at Andrews University, Berrien Springs, Michigan.

[9]*See*, Netteberg, *Does Research Support the Estes Ban on Cameras in the Courtroom?*, 63 Judicature 467 (May 1980).

generally understood in the legal (and academic) world. Sweeping generalities and incredible conclusions are reported as "fact" and adopted by the Appellee as "proof". Appellee overlooked the author's observations that the Florida study[10] (OSCA) ". . . suffered from several methodological flaws, including extreme simplicity in instrumentation and the rush which the Florida Court's deadline imposed upon the researchers." *Id.*, at 472. Interestingly, to Mr. Netteberg, the fact that 80% of the Wisconsin judges and 77% of the Florida judges ". . . thought there was no incompatibility between television and fair trials," *Id.*, did not rise to the level of a constitutionally significant number of negative responses (*i.e.*, 20% and 23%, respectively).[11]

Perhaps, however, the most incredible aspect of Appellee's reliance on the Netteberg article is Attorney General Jim Smith's failure to comprehend that the author concluded, "[w]hile these surveys are more generalizable than case studies, they still *cannot be used as evidence to draw casual* [sic] *conclusions.*" *Id.* [emphasis added].

The *Amici* dismiss the issue of witness and juror impact with the argument that because the majority favors, or does not object to, televising, it is Constitutionally acceptable. That contention begs the question. The Florida News Interests Brief, authored by Talbot D'Alemberte (who is the architect of the televised criminal trial rule and lead counsel for Post-Newsweek Stations of Florida, Inc.) challenges Appellants to answer the question, "What difference in impact [on witnesses and jurors], for instance [is there] between sketch artists and cameras?" (FNI Br. at 27)(footnote omitted). There is a significant difference. At

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[10]The Florida study is analyzed in great detail in Appellants' initial Brief at Point IV-C.

[11]Mr. Netteberg even apologized for the fact that only 1/3 of the Wisconsin trial judges responded to the questionnaires.

least, the Fifth Circuit Court of Appeals has so held in *United States v. Columbia Broadcasting Systems, Inc.*, 497 F.2d 102, 105 (5th Cir. 1974). There, the Court stated, "[w]e are not persuaded, however, that the impact of being sketched for later publication can be equated with the *uniquely prejudicial impact of telecasting.*" [emphasis added]. Lead counsel in *Columbia Broadcasting Systems, Inc., supra,* was Talbot D'Alemberte.

The issue is not whose interpretation of the statistics should prevail. The States' Attorneys General's Brief at 18-38 discusses the results of the Wisconsin experience with distraction and/or disruption of jurors, witnesses and judges. Having examined, very carefully, the underlying Wisconsin Report,[12] certain observations are in order:

1. The Wisconsin Report suffers from the same congenital defects and inadequacies that have been attributed to the Florida OSCA survey.

2. Apparently no attorneys specializing in criminal law were on the Wisconsin Committee,[13] but there were press and media representatives.

3. Attorney General LaFollette's repeated assertion that "the experiment was successful" is purely subjective.

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[12]A copy has been lodged with the Clerk of this Court by *Amicus*. The full title of the document is "Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom", (April 1, 1979).

[13]This is perhaps an appropriate place to respond to the FNI Br. at 5, n.4. The undersigned did *not* participate, *per se,* in the Florida Rule making procedure. The Florida Rule developed despite resistance from all organized bar groups. The undersigned, as counsel for Appellants, *opposed* the rule, and was never offered an opportunity to "suggest" different rules. The only suggestion that the undersigned counsel would have made was "exclude cameras when the defendant objects". That position was made clear in appellate litigation in Florida.

Similarly, the casual use of the word "evidence" in his brief ought to be offensive to the trial bar.

4. The statement that "[t]elevised trials should not be banned at this early juncture when relatively few people have actually participated in one",[14] offered as a justification for continued violation of basic Constitutional rights, is *reductio ad absurdum.*

5. According to General LaFollette, community pressures on jurors are the same whether the trial is televised or not.[15] Again, that is not accurate. Television news gives very limited, highlighted (therefore often unbalanced) news reporting. This format makes television news little more than a "headline" service. How is the viewing audience expected to understand a jury's apparent inconsistent verdict when only the sensational parts of the trial are shown? *See also,* pages 18-19, *infra.*

6. The States' Attorneys General's Brief concludes that based on the Wisconsin study, trial participants were "not significantly distracted".[16] This is not accurate.[17] An examination of the Wisconsin Report establishes the contrary.[18] One Wisconsin Judge was quick to point out that televising trials made him ". . . more selective in [the] choice of neckties each morning . . ." (Wisconsin Report at 24). Perhaps the litigants would have fared better if the Judge had spent that extra time reviewing the trial briefs!

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[14]SAG brief at 14.

[15]*Id.*, at 22.

[16]*Id.*, at 23-35.

[17]*See,* Regan and Cheng, *Distraction and Attitude Change: A Resolution,* 9 Journal of Experimental Social Psychology 138 (1973).

[18]Pertinent excerpts from the Wisconsin Report are found in the Appendix to the Reply Brief (ARB) at 3-10.

While lawyers may debate the issue of witness distraction *ad infinitum*, at least one Court-appointed psychiatrist, called upon to testify in a Wisconsin criminal case, had some rather telling observations which support Appellants' contention. Dr. John Mulvaney's responses to pertinent questions were as follows:

> To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?
>
> Oh, I suppose to some degree. I felt it was not just me. It had an effect on the entire proceeding. I had a negative feeling. The proceeding is more important than the publicity. Newspaper and TV people had a detrimental effect; and not just in the courtoom [sic]. I was not in favor of it. I didn't think people should be on exhibit. It's enough of a circus without making it public.
>
> * * * * *
>
> If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?
>
> Without. I feel my [appearance] was an obligation to the psychiatric community and I was not interested in demonstrating for publicity. TV makes it a public exhibition.
>
> What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?
>
> You would have to ask the jury. I don't know what affect [sic] it had on the questions that were asked me; ask the prosecutor and the defense attorney.
>
> Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio

equipment, and (c) still cameras?

> It doesn't have to be there. The court doesn't have to justify to the public that it is doing right; it doesn't have to apologize to the public. I don't think putting witnesses with instability will make them more stable. It may be a disservice. When a witness has a problem with stability, it won't make him more comfortable.

Wisconsin Report, Appendix I, p.19.

Finally, the States' Attorneys General's Brief, in attempting to establish that televising criminal trials *promotes* witness recollection and thus improves witness testimony, relies on what it labels ". . . a scientific study simulating courtroom conditions . . ." (SAG Br. at 29). The phrase, "simulating courtroom conditions", conjures up the presence of a Judge, (wearing a black robe), with opposing counsel, bailiffs and other courtroom personnel in attendance, and that the witnesses were made aware that their "testimony" was under oath, subject to the penalties of perjury. This study was not even close in its effort to "simulate" a courtroom setting, nor was it "scientific".

The study[19] was conducted by a journalism professor at the University of Wisconsin who employed thirty-six volunteer students (hardly your "average" witnesses). The students were seated in the center of a large room[20] and shown a two minute film describing a German post office in West Berlin. After viewing the film, each student was asked questions about what he or she had seen. The students were divided into three groups. One-third knew they were being televised and could see the camera; one-third knew they were

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[19]Hoyt, *Courtroom Coverage: The Effects of Being Televised*, 21 Journal of Broadcasting, 487 (1977).

[20]As opposed to being seated in the "witness 'stand' ".

being televised but could not see the cameras. The third group was not subjected to any camera whatsoever.

Before being asked to view the film in question, the students were told the study was an attempt to assess the effectiveness of different types of media presentations. The first two groups were also told, *in advance,* of the presence of the camera. Thus, groups one and two *knew* they were being televised while they were observing an event. Hence, the conclusion that witnesses who know they are being televised while they are observing something recollect facts better, is not surprising. Obviously groups one and two made a conscious effort to remember what they were being shown so they could recollect it better. In real life, most witnesses "happen" on the scene, and then weeks, months, or even years later are called upon to recollect events, facts, faces, etc. Unless a potential witness knows today that he is a witness to something, and knows that his present conduct is being recorded, and further, he is told he is going to be "tested" on it in the future, the study is meaningless. In short, the study hardly simulated courtroom conditions, much less real life! Reliance by Appellee and *Amici* on the Hoyt study is preposterous.

### C. Continued Television Coverage of Trials is Likely to Erode the " . . . fundamental conception of what a trial should be." *Estes, supra,* 381 U.S. at 580 (Mr. Chief Justice Warren Concurring)

The purpose of a criminal trial is to see that justice is done. Justice for the victim, society, the system *and* the accused. Television interferes with that purpose. "[T]he courts are playing with social dynamite. Television changes everything it touches, and there is no guarantee that the courts are any more immune than the National Football League." Reeves, "Courtrooms: How Public", *The Post* [West Palm Beach, Florida], May 28, 1980, §A, at 19.

The erosion, or survival, of the jury system in criminal cases, at least, may well depend on the treatment it receives at the hands of the press. Appellants are not unlike David, standing on the Coastal Plain of the Promised Land.[21] No less than thirty-one special interest media groups have joined forces, all proclaiming a right superior to that of the system's life's blood. Without citing any real "evidence",[22] these special interest groups may well prevail, may well dictate which constitutional guarantee is superior, unless this Court "draws the line" as a matter of public policy, so that we return to the fundamental purpose of a trial, i.e., the search for the truth so that justice may be done.

Witnesses called to Court are often reluctant to testify. Witnesses are not anxious to have their pictures taken and/or their faces broadcast. *Amici* contend that televising trials will promote higher standards of justice; witnesses are likely to come forward — offer to testify — right in the middle of a trial (PBS Br. at 21). "[P]erjury and other misconduct will be deterred." *Id.* The author of that sentence, as brilliant and highly respected a lawyer as he may be, simply does not understand the *criminal* trial system.[23]

Most people are not happy about being in Court, much

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[21] I *Samuel* 17:4.

[22] In 1768, Mr. Justice Blackstone defined evidence as ". . . that which makes clear or ascertains the truth of the very fact or point in issue. . . ." Commentaries, III, 367. No 'study' or item cited as 'evidence' by Appellee or *Amici* would ever be admitted into any Federal, or Florida, Court of law under the prevailing decisional or statutory rules of evidence.

[23] Can *Amici* really be serious? Imagine this scenario: In the third day of trial, counsel for Defendant reports to the Court, "Your Honor, I have a new witness." Or, "Your Honor, I move for a mistrial." The lawyer continues, "It seems, Your Honor, last night while watching television, a citizen realized he was a witness to this alleged crime, and he has exculpatory evidence for my client." The variations on the scenario are as limitless as man's imagination. The likelihood of a person coming forward as a witness because he or she has seen a criminal trial in progress is minimal indeed.

less relaxed and self-assured. Fifteen years ago, Judge M. Ray Doubles wrote:

> Timid and nervous as they may be about talking in public, the human nature of the average person is that he be not photographed for public display. Such an ordeal, without question, would not only hamper such a witness in his recollection and ability to accurately give his testimony, but his demeanor on the witness stand would reflect adversely upon the weight of his testimony in the minds of the jury to the disadvantage of the party for whom his testimony is given.
>
> It is no answer to such a person that the camera itself is hidden in a booth outside the walls of the courtroom. The fact that he knows he is being televised would be sufficient to unnerve him. Nor is it an answer, as provided in the Colorado Canon, that no such witness shall be photographed over his express objection. This requires him to take the affirimative [sic] and register a protest in advance in order to protect himself from such an ordeal. He may very well feel that to register such a protest labels him as a weakling of some sort, and pride may prevent him from doing so.
>
> At the other extreme is the danger inherent in the testimony of the witness who is not only willing but anxious to be televised as he gives his testimony. He is a willing actor, and his concern will be with his effectiveness as an actor rather than compliance with his oath to tell the truth and nothing but the truth.
>
> Furthermore, there is the juror to consider. He is summoned and required to serve, unless excused, irrespective of his desires or the inconvenience it may cause him. But here again, he is summoned to listen,

> ponder and render judgment — not to participate in a glamour contest. In his work as a juror he should be afforded an environment in which he can concentrate on his task as a juror, and not be concerned as to whether his frown is doing an injustice to his naturally photogenic features, or whether his crooked tie and ruffled hair are the butt of jokes, around the TV screen at Joe's Beer Tavern or the Country Club.

Doubles, *A Camera in the Courtroom,* 22 Wash. and Lee L.Rev. 1, 14 (1965).

What high standard of justice is promoted by offering a different form of "entertainment" to the average American household? *Amici* and Appellee argue that televising the Midnight Mass,[24] naturalization proceedings,[25] concerts and operas, *inter alia,*[26] or even the Pope's Coronation, does not detract from the solemnity of those occasions, and therefore, it is perfectly acceptable to televise criminal trials. The logic of that assertion escapes Appellants.

Regardless of media's disclaimer of responsibility[27] in connection with the tragic aftermath of the "McDuffie" verdict, others have linked the rioting in Miami to the highly selective and sensationalized television reporting of in-courtroom scenes.[28] Attorney and Harvard Law Professor, Eric Salzman, producer of the television show, "CBS Reports: The McDuffie Trial", undertook a serious effort to understand the McDuffie case, the verdict and its impact on the community. Salzman observed that at first he thought

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[24]PNI Br. at 11, n.19.

[25]Appellee Br. at 61.

[26]PBS Br. at 12-14.

[27]*See,* FNI Br. at 21-22; Appellee's Br. at 102-104.

[28]*See, for example,* the *sworn* testimony of City of Miami (Florida) Police Chief, Kenneth I. Harms, before the Governor's Special Commission (investigating the causes of the May 1980 riots) on July 8, 1980, found in ARB at 10-11; *see also,* Appellants' Brief at 51, n.28.

the not guilty verdict in McDuffie was a "red-neck" decision. "Salzman Changes Mind About 'Red-Neck' Decision", *Miami News,* August 27, 1980, §B, at 5. Because of the riots, Salzman studied the trial and the verdict. Salzman ". . . had to forage through the video tapes of no fewer than eight television stations before [he] could compile footage of the trials. He found no one had a complete record . . . . It was cut off at the whim of the cameramen or the directors." *Id.* Then Salzman read the entire 2,500 page transcript of the trial. *Id.* Eventually, having read the entire trial transcript and completing his investigation, he understood what we, as criminal trial attorneys, understand. The verdict was "correct" based on the "system" and the evidence.[29]

The community did not have the benefit of gavel-to-gavel coverage. The media elected to broadcast in 30-60-90 second clips, the State's witnesses demonstrating how the defendants beat the victim, the medical examiner describing the fatal wounds, and gross pictures of McDuffie's injuries. Joann Hooker, "CBS Reports: The McDuffie Trial", *Miami News,* August 27, 1980, §B, at 5. The "surrogates" did not televise the hour-after-hour of relentless and damaging cross-examination of the State's witnesses by the defendants' attorneys, nor did media broadcast any of the fatal gaps in the State's case. Little wonder, then, at the community's inability to understand the acquittal.

The "surrogates'" claim, that "public television's broadcast coverage of judicial proceedings is programming of great social value",[30] is, under these circumstances, sheer hypocrisy. Appellants do not contend that public television is

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[29]Salzman also observed that, in his opinion, the verdict was a result of a ". . . series of miscalculations by the Dade County State Attorney's Office." *Miami News,* August 27, 1980, §B, at 5. Florida State University College of Law Professsor, Ken Vinson, came to a similar conclusion. *See,* "McDuffy Verdict Was 'Justice' ", *Tallahassee Democrat,* June 9, 1980, §A at 4.

[30]PBS Br. at 7-23; see also, RTNDA Br. at 10-11.

"utterly without redeeming social value", rather, in the context of a defendant's right to a fair and impartial trial, it obviously "lacks serious literary, artistic, political or scientific value".[31]

## D. There Is No Constitutional Basis to Justify Televising a Criminal Trial[32]

The accused's Sixth Amendment Right to a fair and impartial trial has a preferred position in criminal proceedings. *Estes v. Texas, supra; Sheppard v. Maxwell,* 384 U.S. 333 (1966); *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969). Nothing in the several opinions in *Richmond Newspapers, Inc., supra,* suggests anything to the contrary.

Even if televising criminal trials "promotes First Amendment *interests*", as argued by all four of the special interest media "surrogates",[33] that is still insufficient justification to deny the accused his individual Constitutional *rights*. If ". . . a purported [international] treaty obligation of the United States Government cannot override an individual Constitutional right", *In re Geisser v. United States,* No. 79-3869, Slip op. at 248 (5th Cir., Oct. 10, 1980)[citing *Geisser v. United States,* 513 F.2d 862, 869, n. 11 (5th Cir. 1975)(citing *Reid v. Covert,* 354 U.S. 1 (1957)], how can this Court, consistent with its obligation to the Constitution, derogate Appellants' Sixth Amendment *right* to that of a First Amendment *claim?* All the media *Amici* missed the point. Because television is different, *United States v. Columbia Broadcasting System, Inc., supra,* and because human nature is what it is, even if televising a trial fosters First Amendment interests, where a defendant objects

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[31] *Cf., Miller v. California,* 413 U.S. 15 (1973).

[32] Appellee and four *Amici* (CBS, CCJ, PBS and RTNDA) have raised the issue of State's Rights. Appellants' response to that issue is found at Point V, *infra.*

[33] CBS Br. at 4-11; FNI Br. at 3-6; PBS Br. at 27-29; RTNDA Br. at 9-16.

to the presence of electronic or still photographic equipment in the courtroom, the Constitution requires that the accused be given the benefit of the doubt. Under our system of justice, as imperfect as it may be, " 'tis far better to err in favor of a guilty person than it is to err against an innocent one." Televising political, administrative and even legislative proceedings is different than televising a criminal trial. The public will not be "better" informed by 30-second newsclips of a rape victim pointing at the defendant; instead, the victim will suffer greater humiliation. Furthermore, if, for any reason (including insufficiency of evidence) the defendant were to be acquitted, his unwanted television notoriety will follow him to his grave.

Who will be the humiliated and embarrassed victim's "surrogate"? Who will pick up the gauntlet for the acquitted defendant? What if, while promoting its own Nielsen ratings by sensationalizing the news, the media (even inadvertently) breaches the jury's integrity, thereby destroying its ability to function fairly and impartially, with the result that an innocent person gets convicted? Who will be *his* champion?[34]

*Amicus* PBS contends that Appellants are not entitled to relief because of the alleged lack of "facts to substantiate their claim that the mere presence of a television camera in the courtroom adversely affects witnesses and jurors". (PBS Br. at 26). Counsel for PBS has overlooked the sociological and psychological studies relied upon in Appellants' initial brief. The Constitutional question turns on subconscious considerations. Asking a witness or a juror the question, "Will being on television [subconsciously] bother you?" is an

[34] "In trial by battle, clerks, infants, children, and those over sixty years of age were from the first allowed to employ 'champions,' who fought in their stead; and subsequently the right to employ champions was extended to all litigants. Down to the Statute of Westminster I, 1275, c. 41, the champion was obliged to swear to his belief in the truth of the case set up by his principal, and, if it could be proved that he had sworn falsely, he was liable to lose a hand or a foot." Jowitt & Walsh, *Dictionary of English Law*, 342 (1959).

exercise in futility. If we knew how to consciously measure the subliminal, we would have little need for psychologists, psychiatrists, psychotherapists and sociologists.

*Amicus* RTNDA offers the most novel argument for continuation of the rule: " . . . [p]hotographers and electronic journalists [are now] on a par with print reporters in their ability to communicate through their respective media." (Br. at 15). There, then, is the real basis for the "surrogate's" efforts to override the accused's Constitutional right, economic competition. Next, the copy editors and the typesetters will clamor to have their equipment in the Courtroom. Perhaps the solution is to simply move the trial — lock, stock and barrel — to the television station or to the newspaper's plant.

Regardless of the "window dressing" arguments advanced by *Amici* States' Attorneys General and States' Chief Justices, no organized bar group or professional legal society has taken a position in support of continuing the "experiment". To the contrary, in addition to the *Amici* briefs filed by the American College of Trial Lawyers and the California State Public Defender's Association, *et. al.*, the National Association of Criminal Defense Lawyers has taken a firm and unremitting stand against the use of cameras and recording equipment in all criminal trials.[35]

Equally important is the position taken by Milwaukee County (Wisconsin) District Attorney, E. Michael McCann, ". . . [who is] profoundly committed to the position that cameras should be excluded from the court when vetoed by the defendant."[36] Mr. McCann's commitment to the Constitutional rights of the accused is consistent with the highest legal and ethical responsibility imposed by our system

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[35]*See,* ARB at 11-12.

[36]Mr. McCann's position is clearly stated in a remarkably candid letter addressed to Appellants' counsel which is reprinted, in its entirety, in ARB at 13-14.

on a prosecuting attorney. Mr. McCann's office has previously sought, in an application to this Court, to prevent the televising of a criminal trial in an effort to protect the rights of the accused, and witnesses, in order to assure that "justice" would be served.[37] It is remarkable that the Attorney General of the State of Wisconsin would press for televising criminal trials, even over a defendant's objection, while those who enforce the law on a daily basis, in his own State, oppose the presence of television equipment in the courtroom.

## IV.

## PERMITTING ELECTRONIC MEDIA AND STILL PHOTOGRAPHIC COVERAGE DURING A CRIMINAL TRIAL OVER THE DEFENDANT'S OBJECTION, ON BALANCE, DENIES THE ACCUSED DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

The States' Attorneys General's Brief concedes the "nub" of the question. Where a defendant objects to the presence of television equipment, "different" Constitutional questions are raised than where there is no objection. (SAG Br. at 7, n. 1). As Appellee correctly points out in its Brief at 111, n. 44, in twenty years Colorado '. . . has never had a trial declared constitutionally unfair because of the mere presence of a television camera . . . .' That is because Colorado *requires the consent of the defendant!*[38]

This country was founded on the concept that

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[37] *See, State of Wisconsin v. Mendoza,* United States Supreme Court Misc. No. A-840 (Application for stay of trial proceedings pending filing of Petition for writ of Certiorari, Denied by Mr. Justice Stevens on April 5, 1978).

[38] *See,* Colorado Code of Judicial Conduct, Canon 3(A)(7)-(10), Colo.Rev.Stat., Vol. 7A (Court Rules), Appendix to Chapter 24; and RTNDA Br. at A-5.

government derived its ". . . just Powers from the Consent of the Governed . . ." Declaration of Independence, July 4, 1776. Appellee and *Amici* would have this Court brush aside, in fact ignore, that basic precept. Appellants contend that having refused consent, thereby declining to freely and voluntarily waive their Constitutional rights, they have been denied due process of law.

The fact that Appellants cannot measure or quantify the prejudice *sub judice* is immaterial. ". . . [T]he concept of due process of law is not final and fixed . . ." *Rochin v. California*, 342 U.S. 165, 170 (1952).

As reluctant as this Court may be to reverse the convictions of Appellants,[39] the Due Process Clause compels that result where there has been a violation of the guarantee of fairness in a criminal trial.[40] *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927); *Betts v. Brady*, 316 U.S. 455 (1942); *cf., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Estes v. Texas, supra.; Sheppard v. Maxwell, supra.; Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956).

Appellants' contention, in a nutshell, is that where a defendant objects to the presence of electronic and still photographic equipment, they must be excluded from his trial or there is a *per se* violation of his right to due process of law.[41]

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[39]Mr. Justice Stewart stated it thusly, ". . . it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice." *Bumper v. North Carolina*, 391 U.S. 543, 550-551, n.16 (1968).

[40]Appellee's and CBS' reliance on *Spencer v. Texas*, 385 U.S. 554 (1967), is misplaced. *Spencer* dealt with the constitutionality of a Texas Rule of Criminal *Procedure*, as opposed to the *substantive* rule *sub judice*.

[41]Conversely, where a defendant fails to object, and where such waiver is free and voluntary, he ought not be heard to complain.

## A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice.

Appellee and two *Amici*, CBS and RTNDA, contend that Appellants are not entitled to reversal of their convictions because they are not able to point to *specific* prejudice. CBS argues Appellants' case was "routine". (CBS Br. at 17-21). It is not unusual that the "black and white" record fails to communicate the true flavor of a case. Gone are the personalities, tensions and pressures. Missing is the "roar of the greasepaint, the smell of the crowd." No matter whose version of the facts this Court adopts,[42] the case, the crimes, and the manner in which Appellants were detected are hardly "routine".[43] The presence of the television cameras, even for just a portion of the trial, established the "newsworthiness" of the case.[44]

An interesting comparison may be found in the *Estes* case. There, the *pretrial* motions were televised extensively, because media was concerned, at least in part, by Estes'

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[42]Appellants stand on their version of the facts. Of all the many counsel in this case at this point, only one, the undersigned, was present in the trial court. Appellants contend their version of the facts is accurate, notwithstanding the assertions of CBS in its Brief at 20-21, n.43 and 48. The trial court made it quite clear to trial counsel that the latter "had better 'clean up' the record". App. at 9. And, the trial judge initially said he would give a specially requested instruction regarding witnesses not watching television (App. p. 7), but later that day, when again requested, declined to do so (App. p. 14). Finally, prospective juror Warren did agree, at first, that if a camera was in the courtroom, there was "something special" about the case (App. 9).

[43]*See* Appellee's Br. at 84, n.28, detailing the local newspapers' coverage of Appellants' trials and tribulations.

[44]CBS' suggestion in its Brief at 18, n.35, that the case was not newsworthy because television stations did not cover the motion to suppress is absurd. In fact, the reason there was no television equipment in the courtroom at the time of the motion to suppress was because by the time the television stations found out about the hearing, it was over!

efforts to preclude live coverage. *See, Estes v. Texas, supra.*, 381 U.S. at 535-536. The only live telecasting of *Estes'* trial itself was the closing arguments of the prosecutor and the return of the jury's verdict. *Id.*, at 591, n. 1, and 608. Thus, in *Estes,* there actually was even less "demonstrable" prejudice. Appellants contend that the very nature of the problem makes "testing" and "measuring" impossible. Thus, a *per se* rule[45] is the only workable solution.

In a rather extraordinary statement, CBS asserts that because of the public's familiarity with, and acceptance of, television today, ". . . there is no sound basis for presuming that any significant adverse psychological effects on jurors, witnesses or other participants occur." (CBS Br. at 15). That statement is totally unsupported by CBS. Not a single item of evidence, not a single psychological study is offered in support of that conclusion, nor could there be, for that statement is totally contrary to human nature. It is as if argument of counsel has been elevated to evidence!

Finally, contrary to Appellee's and *Amici's* assertions, this Court has indeed fashioned *per se* rules when necessary

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[45]Appellants urge this Court to adopt a rule which would allow the *accused* (not the "surrogate") to be the primary judge of whether his trial should be televised. Where a defendant does not object, but a witness, juror or other participant does, then the trial judge should have the discretion to make such decisions as are consistent with the objector's individual rights, and the public's right to know, as well as the press' (reasonable) right of access in news gathering activities. Interestingly, Hillsborough County, Florida Circuit Court Judge Morton J. Hanlon proposed to the Florida Constitutional Revision Commission, on August 5, 1977, that the question of televising trials be put on the State's Referendum Agenda for inclusion in the Florida Constitution. This Commission declined to put the matter on the State ballot. In fact, the proposal never got out of committee. *Amicus* FNI's attorney, Talbot D'Alemberte, was chairman of the Florida Constitutional Revision Commission at the time.

to protect an individual's fundamental Constitutional rights.[46]

*Amicus* CBS contends that the Due Process Clause only protects an individual where there is a defect in, or impediment to, "fundamental fairness in fact-finding." (*See*, CBS Br. at 10, n. 20, and cases cited therein). Appellants agree. That is their very argument. The presence of television and still photographic equipment in a courtroom over their objection gives rise to a departure from fundamental fairness in the fact-finding process.

## B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints the Appellants' Convictions.

Appellee and several *Amici* claim that the Florida

[46]*See, e.g., Gilbert v. California*, 388 U.S. 263, 273 (1967) (violation of Sixth Amendment right to counsel at post-indictment lineup at which defendant is present results in the automatic exclusion of that identification); *see also, United States v. Wade*, 388 U.S. 218 (1967); and *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (no incarceration permitted unless defendant has been afforded right to counsel at his prosecution); *see also, Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Miranda v. Arizona*, 384 U.S. 436, 444-445, 467-476 (1966) (confessions obtained during custodial interrogation are inadmissible in State and Federal criminal trials if certain procedural safeguards have not been observed, or if the suspect has failed to make a knowing, intelligent, and voluntary waiver of his Fifth Amendment rights before confessing); and *Casteneda v. Partida*, 430 U.S. 482, 492-493 (1977) (denial of equal protection to try defendant under indictment returned by Grand Jury from which all persons of defendant's race or color have been intentionally excluded by the State solely on the basis of race or color); *see also, Swain v. Alabama*, 380 U.S. 202 (1965); and *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (jury selection system that operates to exclude women from jury duty does not provide fair cross section of community, and hence violates Sixth Amendment); *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (white may object on Sixth Amendment grounds to the exclusion of blacks in jury selection system although no prejudice shown); *see also, Duren v. Missouri*, 439 U.S. 357, 359, n.1 (1979).

experiment was "carefully designed and cautiously conducted,"[47] that Florida "carefully evaluated the possibilities of prejudice to defendant's rights, both when it authorized the experiment . . . and when it established a permanent rule,"[48] and finally, that "Florida adopted the rule allowing access only after lengthy and deliberate proceedings."[49]

Those broad statements are totally unsupported by the facts. First, according to the Docket Sheet in the Florida Supreme Court in connection with the Rule change,[50] only eight trial judges filed reports regarding televised trials during the one year experimental period.[51] Second, no records were kept of the number of criminal trials televised, the number of criminal trials not televised, the number of defendants who objected, the number who did not; nor were any records kept of the number of defendants whose televised trials resulted in acquittals, convictions or mistrials, as opposed to those defendants whose trials were not televised. Third, absolutely no sworn testimony or adversary hearings were ever conducted by Florida Supreme Court.[52] *Cf., In re Hearings concerning Canon 35 of the Canons of Judicial Ethics,* 296 P.2d 465 (Colo. 1956). Finally, suggestions *before,* during and after the experimental period made to the Florida Supreme Court that experts in the fields of psychology and sociology be utilized, were totally ignored.[53]

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[47]SAG Br. at 6-14.

[48]RTNDA Br. at 19-20.

[49]FNI Br. at 6-15.

[50]*In re: Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979) [Florida Supreme Court Case No. 46,835].

[51]There are 286 Circuit Court trial judges in Florida. Only 8 responded to the Florida Supreme Court's invitation to file a "report". Of the 8 reports, only 2 favored televising criminal trials (Baker and Green). One was somewhat neutral (Mounts) and the other 5 (Sholtz, Smith, Pate, Hanlon and Richardson) were largely opposed to the rule.

[52]If there were such hearings which included *testimony,* the results are not filed with the Clerk of the Florida Supreme Court.

[53]*See,* ARB at 15-22; *see also,* Appellants' Brief at 42, and the Appendix thereto, AB-11.

Perhaps, the most significant response to Appellee's and *Amici's* contention, however, is found in the knowledge that the Florida Supreme Court could have, and should have, formulated a meaningful study *before* it embarked on this uncharted course. See, ARB at 18, 20-21. The failure to have done so implicates the Due Process Clause even without a showing of specific, measurable prejudice.

**C. The "In House" *Post Hoc* Office of the State Administration (OSCA) Survey Commissioned and Relied Upon By the Florida Supreme Court to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically Unacceptable".**

**D. A Close Analysis of the Survey Establishes That There is a Constitutionally Significant Number of Witnesses and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment.**

**E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye.**

Appellants rely on the arguments in their Initial Brief on Points C, D, and E.

## V.

## NEITHER THE APPELLEE'S NOR *AMICI'S* BRIEFS JUSTIFIES THE CONTINUED TELEVISING AND PHOTOGRAPHING OF CRIMINAL TRIALS IN PROGRESS OVER A DEFENDANT'S OBJECTION.

**A. The Media *Amici* Represent Special Interests, and Are Not the Public's "Surrogate".**

This Court has a duty to the Constitution, and to the Appellants' right to a fair and impartial trial. The *Amici* briefs reflect special interests seeking to divert this Court from its duty. RTNDA's Brief, for example, urges this Court to continue the experiment because of the ". . . rich variety of approaches in terms of the technical specifications . . ." *Id.*, at 24. How that serves as a logical basis for continuing to televise a criminal trial over the accused's objection is beyond comprehension. It has been reported that in the past ten years, "[c]rime certainly brought out the worst in broadcasting in its day-by-day exploitation on both the news and entertainment segments of the [television] schedule." Barrett & Sklar, *The Eye of the Storm: The Alfred I. DuPont-Columbia University Survey on Broadcast Journalism,* 20 (1980).

The media is not bound by, nor married to, their Code of Ethics. For if it were, then "[j]ournalists at all times [*would*] show respect for the dignity, privacy, ***rights,*** and well-being of people encountered in the course of gathering and presenting news."[54] Presumably media does strive for accuracy and objectivity. However, in reporting, the media rarely considers the impact that even a "straight"[55] news story has on a defendant's right to be tried by a particular jury which has been painstakingly selected by both prosecution and defense counsel. See, *United States v. Williams, supra.*

Media's efforts at "self-policing" have been largely unsuccessful. Television in particular has been responsible for the growth of a new area of tort law, "broadcast liability". See, Perlman & Marks, *Broadcast Negligence: Television's Responsibility for Programming,* Trial (August 1980). This, then, is the "surrogate" in which Appellee and the States' Attorneys General would have us place our trust.

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[54]Code of Ethics of the Society of Professional Journalists [*see* subsection on "Fair Play"].

[55]A "straight" news story is one devoid of editorializing or commentary. *United States v. Williams,* 568 F.2d 464, 466, n.1 (5th Cir. 1978).

Finally, the Appellee and media claims of the "surrogates' " role as an educator,[56] can neither be taken seriously, nor serve as a basis to override individual Constitutional rights.[57] That argument is met by the Report of Palm Beach County Circuit Judge Thomas E. Sholts, previously provided to the Court.[58] Judge Sholts stated:

> The media claims the right to take still photographs, to tape and broadcast testimony and to televise trials because it wishes to educate the public. *I doubt the intellectual integrity of the media's position in making its request to change Canon 3A(7).*[59] [emphasis added].

## B. Traditional Adherence to Federalism is Insufficient Justification for Continuing the "Experiment" in Televising Criminal Trials.

How true it is, "politics makes strange bedfellows." The distinguished former Attorney General of the United States, Griffin B. Bell, argues on behalf of the Conference of Chief Circuit Justices, that this Court ought not interfere with the rights of the individual states.[60] Several media *Amici*[61] press that same argument, in one form or another, along with Appellee, who mentioned it in passing.[62] Ironically, that issue is only obliquely raised by the seventeen States which joined in the States' Attorneys General's Brief.[63]

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[56]*See* Appellee's Br. at 104-111; FNI Br. at 20-21; PBS Br. at 12-13.

[57]*See* Appellee's Br. at 111 (Defendant has a superior right to a fair trial).

[58]SAG Br. at 8, n.2.

[59]"Report to the Florida Supreme Court Regarding the Use of Audio-Visual Equipment During the Mark Hermann Murder Trial," at 15. Other observations by Judge Sholts are equally telling. He confirms virtually every argument advanced by Appellants. *Id.*, at 16-21.

[60]CCJ Br. at 4-14.

[61]CBS Br. at 10, n.20; RTNDA Br. at 27-29; PBS Br. at 23-25.

[62]Appellee's Br. at 112-117.

[63]SAG Br. at 4-6.

The sudden movement towards, and interest in, the principles of "Federalism" are obviously tied to Mr. Justice Rehnquist's dissenting opinion in *Richmond Newspapers, Inc. v. Virginia, supra,* 100 S.Ct. at 2842-2844. This issue was never raised before at trial, or at any State appellate proceeding. A variation on this theme of "federalism" is the abortive attempt to apply the "Pullman Abstention Doctrine".[64] These arguments fall far short of the mark.

In the first place, we are *not* dealing with an issue involving State Court procedure, hence, Appellee's reliance on those cases cited in its Brief at pages 112-113 is misplaced. None of those cases[65] are relevant to the issue *sub judice,* nor are any of the cases which concern "abstention".[66]

Moreover, Appellants do not quarrel with the notion that States should be left free to "experiment" in social and economic areas as suggested by Mr. Justice Stevens in

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[64]Appellees Br. at 113, and CCJ Br. at 7, n.11.

[65]*County Court of Ulster County, New York v. Allen,* U.S. , 99 S.Ct. 2213 (1979) (New York statutory presumption valid), *Wainwright v. Sykes,* 433 U.S. 72 (1977) (decision below based on adequate state grounds); *Henderson v. Kibbe,* 431 U.S. 145 (1977) (mere erroneous jury instruction by itself not valid grounds for collateral attack on State Court judgment); *Whalen v. Roe,* 429 U.S. 589 (1977); *Murphy v. Florida,* 421 U.S. 794 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) *(Broadrick* reiterated the principle that Constitutional rights are personal and may not be raised by third parties. How then does the media litigate the "public's right to know"?); *Williams v. Florida,* 399 U.S. 78 (1970) (six-man unanimous jury in noncapital case approved); *Spencer v. Texas,* 385 U.S. 554 (1967) (State Rule of Procedure not fundamentally unfair); and *Beck v. Washington,* 369 U.S. 541 (1962) (record established that Grand and Petit juries were not biased despite pervasive pretrial publicity).

[66]*Stone v. Powell,* 428 U.S. 465 (1976) (Federal Courts will not entertain State *habeas corpus* convictions where there has been a full opportunity to present Fourth Amendment claims); *O'Shea v. Littleton,* 414 U.S. 488 (1974) (abstention doctrine applies absent irreparable harm); *Younger v. Harris,* 401 U.S. 37 (1971) (Federal Court will not interfere with pending State criminal cases absent bad faith or harassment); or *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941) ("Pullman Abstention Doctrine").

*Whalen v. Roe,* 429 U.S. 589, 597-598, n. 20 (1977). Provided, of course, no individual personal Constitutional right is lost during the experiment. What Appellee and *Amici* fail to appreciate, however, is that the televised criminal trial rule is neither a social, nor economic, experiment. It is, instead, an ill-advised experiment in "living" jurisprudence, the effects of which, at best, are unknown, and at worst, disastrous.

Former Attorney General Bell dismisses Appellants' arguments as ". . . a parade[67] of speculative horribles to fight phantom issues." (CCJ Br. at 12, n. 23). That "speculative" parade marched through Miami, without a permit, in the wake of the McDuffie verdict. The issue was real, not illusory, to Adelita Green. *See, Green v. State,* 377 So.2d 193 (Fla. 3d DCA 1979) (cert. granted by the Florida Supreme Court, Case No. 57,398). Parades are for circuses which is what cameras make of the courtroom.

When one argues for victory, and not for truth, he may be assured of just one ally, the devil himself, and that is to whom the "dues will be paid" unless this Court ends the experiment.

### C. Neither the Application of the "Government In The Sunshine" Concept, Nor the Expenditure of Public Funds Justifies the Violation of Fundamental Individual Rights.

Finally, it is argued that Florida's commitment to "Government In The Sunshine"[68] and the expenditure of public money for educational television,[69] justify televising criminal trials over a defendant's objection. Both propositions border on the ridiculous when measured against

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[67]"A parade is a large public procession, usually including a marching band and of a festive nature, held in honor of an anniversary, a person, an event, etc., and accompanied by marching band music." *Random House Dictionary of English Language,* 1045 (Unabridged Ed., 1967).

[68]FNI Br. at 15-20; PBS Br. at 23-25.

[69]PBS Br. at 7-23.

the Constitutional rights of the accused in the framework of our system of criminal justice.

It is well known, medically, that too much sun can cause skin cancers. The "surrogates" do not care what "disease" they visit upon the public figure, nor do they care what ". . . tattoo [they leave] on the epidermis." *Carlisle v. State,* 176 So. 862, 864 (Fla. 1937). Regardless of the effect on the accused, the nightly news "must go on". Florida's commendable commitment to "open government" ought not be extended to the point where it devours individual Constitutional rights. Florida's Courts are, and will remain, open to the public, even if Appellants prevail. Only the television and still photographic equipment will be barred. News reporters and the public alike will continue to have access to the courtroom.

How does televising a criminal trial over the defendant's objection ". . . afford the accused greater protection than the Federal Constitution requires"? (PBS Br. at 26, footnote omitted). How does the expenditure of millions of dollars on public broadcasting justify televising a criminal trial over a defendant's objection? So what if public television now reaches millions of households daily? What do *Sesame Street* and *Mr. Roger's Neighborhood* (PBS Br. at 12, n. 14), have to do with a defendant's rights to a fair and impartial trial, and Due Process of Law? As Dean Erwin N. Griswold wrote:

> A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and is not held for public delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process.[70]

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[70]*The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered,* 48 ABA Journal 615, 616 (July 1962).

Former Attorney General Bell argues, ". . . that under the Federal system, states are given broad latitude to experiment in solving problems." (CCJ Br. at 7). What problems have televising a trial over a defendant's objection solved?

## CONCLUSION

Appellants' case presents no apparent conscious prejudice. However, there are other cases, pending and yet to be tried, which will present different and even greater degrees of measurable prejudice. The mere fact that there is no "litmus paper" test to measure the subconscious effect of televised criminal trials, is insufficient justification to deny the relief sought, or to decline to fashion meaningful guidelines for the bench, the bar and the public. Whatever affects one man directly, affects all men indirectly.[71]

John Donne, the distinguished and revered 16th Century English poet said it far more succinctly:

> No man is an island entire of itself; every man is part of the main . . . Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

This Court has a Constitutional obligation to "sound the death knell", to "toll the bell", to put an end to this ill-advised experiment in criminal justice.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esquire
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320
*Counsel for Appellants*

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[71]An unsolicited letter filed in The Florida Supreme Court by "ordinary" citizens sums up Appellants' argument rather well. It is printed in its entirety in ARB at 23.

# Appendix
# to
# Reply Brief

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REPORT OF THE [WISCONSIN] SUPREME COURT COMMITTEE TO MONITOR AND EVALUATE THE USE OF AUDIO AND VISUAL EQUIPMENT IN THE COURTROOM

(APRIL 1, 1979)

(EXCERPTS)

A. **RE: STATE v. DILLABAUGH**

1. Remarks of Court Observer:

* * * * *

The movie camera could be heard by the observer just before the rail, but only during very quiet pauses. The shutters of the still cameras were clearly audible throughout the trial. *Id.*, at 7.

* * * * *

All wanted photographs of the 5-year-old complainant who was to take the stand after the recess.

* * * * *

There had been some problem the day before with the microphones on the counsel's table picking up defense counsel-client and co-counsel-counsel conversations. Apparently, if the volume of a home television set was turned up high enough, these conversations could be understood. *Id.*, at 8.

* * * * *

While the defendant was testifying, his attorney objected to the fact that the defendant was being photographed with

one of the exhibits (the paddle used in the alleged battery) in his hand. He objected, for the record, that the prosecutor had made his client pose in a manner "calculated for picture taking and improper." *Id.*, at 9.

* * * * *

2. Remarks of Trial Judge:

What, if any, influence do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on you during the trial?

I was conscious of their presence, although I couldn't hear the camera shutters, for instance. They had an indirect effect in that a large courtroom with good acoustics was used, which made it easier to hear the witnesses. The cameras made me more aware of my posture, so I sat erect much of the time.

* * * * *

Did the presence in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras produce more letters, telephone calls, et cetera, than you usually receive?

No, there were some comments from acquaintances who had seen me on TV, but I don't get many calls or letters about cases anyway.

What, if any, impact do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on the witnesses?

They were more apprehensive, nervous, scared. The fact that it was a full courtroom with a lot of activity may have combined with the presence of the cameras to cause this. *Id.*, at 11.

* * * * *

What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the behavior of counsel?

The cameras affected them in their unconscious actions, in the same way the cameras affected me — little things like sitting up instead of slouching down. *Id.*, at 12.

* * * * *

Overall, what is your general evaluation of the use of (a) television cameras, (b) radio equipment, and (c) still cameras, in the courtroom?

Basically, I don't believe in them. If I were charged with a crime, I would not want it to be televised or photographed.

Everything went beautifully in this case, but this wasn't a serious enough case. There will be trouble with cameras in the courtroom in other cases.

If the defendant had been convicted, I would have been criticized for not sequestering the jury. As it was, they probably watched themselves on TV at night during the trial. *Id.*, at 13.

* * * * *

3. Remarks of Defense Attorney:

* * * * *

To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

The still cameras were too loud, there was too much movement and jockeying for position by the still photographers, especially during dramatic moments when there was a distracting flurry of activity by the photographers.

The television cameras in the hallway outside followed the jurors entering and leaving the jury room, and I think that this had an undue influence on the jurors, giving them almost a celebrity status. *Id.*, at 14.

* * * * *

What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

There was unnecessary filming of them when they were not in the jury box. This placed an undue influence on the jury, and they may have been caught up in the drama of the thing. The cameras, TV and still, could have affected their judgment and distracted them from their duty. *Id.*, at 15.

* * * * *

4. Remarks of Prosecutor:

* * * * *

To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

The clicking of the still cameras was distracting. *Id.*, at 17.

* * * * *

What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

The nightly replay was helpful.

My only concern with cameras is their effect on reluctant or frightened witnesses. Testifying in public is hard enough without putting their performance on television. *Id.*, at 19.

* * * * *

B. **RE: THE McCOY MURDER CASE**

1. Remarks of News Director for Commercial Television Station:

* * * * *

All in all, I saw the jury distracted from their concentration on testimony perhaps once or twice during the entire proceeding; and only one or two jurors at each of those times. *Id.*, at 26.

* * * * *

2. Remarks of Trial Juror:

One juror wrote: "I would just as soon see cameras in court discontinued. It was neither a good or bad experience for me." He also said that his wife received a number of calls on seeing him on television, and he expressed the fear that in some cases those could be crank calls. *Id.*

* * * * *

C. **THE TRIAL OF RICHARD TODD BUCK**

1. Remarks of Observer:

* * * * *

Judge Holz, however, claimed that the cameras simply add an extra burden on the judge in an already difficult situation, for example, an important murder trial . . . The defense and prosecution both agreed that they would rather try a case without cameras in the courtroom. Their rationale, however, differed. The prosecutor claimed that media coverage puts the trial in the public eye. For that reason, he claimed, the jury is reluctant to return a harsh verdict. He further complained that camera use automatically gives defense counsel an issue for appeal. Defense, on the other hand, claimed that the notoriety of a covered trial makes the jury more reluctant to return a lenient verdict. *Id.*, at 29.

* * * * *

In response to the questions as to whether the use of cameras resulted in more letters, telephone calls, etc. than he usually receives, the judge responded, "definitely." He also thought that the cameras have "a noticeable effect" on the witnesses. *Id.*, at 30.

* * * * *

In his responses to the questions put to him by our observer, defense counsel Shellow asserted that the presence of cameras in the courtroom distracted him from the tasks at hand during the trial "regularly." As to whether the presence of cameras affected the strategy of litigation, Mr. Shellow declared that "it affected the basic decision of whether we would have the defendant take the stand in the case." He also expressed the opinion that the cameras had "an obvious effect on one witness, . . . who was extremely distraught while testifying in front of the cameras." *Id.*, at 31.

* * * * *

Our observer points out that defense counsel did not argue for a not guilty verdict at any time during the proceedings, and

that the verdict of manslaughter rather than second degree murder was regarded as a victory for the defense. When asked whether he thought the use of cameras had an effect on the fairness of the trial, Mr. Shellow responded, "Certainly. Prosecutor Sosney was obviously responding to camera use during the trial." Finally, Mr. Shellow indicated that he would have preferred to try the case without cameras in the courtroom, asserting that the practice "unfairly prejudices the jury. Distorts fact finding. Only one juror during the voir dire was candid enough to admit that the cameras might have affected him. The others were 'less than candid,' when they claimed their use would have no effect."

In his responses, defense counsel Glynn said that the cameras distracted him "on occasion," that the presence of cameras affected the choice of exhibits offered into evidence, because of the sensitivity of matters at issue, and he declared that "we changed examination strategy" because of the presence of cameras in the courtroom. *Id.*, at 31-32.

Mr. Sosney [the prosecutor] did not believe that the use of cameras had any effect on the length of the trial, but when asked whether it had any effect on the outcome of the trial, he responded: "It is difficult to speculate. Yet, jurors must feel unusual because of the uniqueness of media coverage." In response to the question as to whether the cameras affected the fairness of the trial, the prosecutor replied: "If anything, it is unfair to the state's interest and to the people of Wisconsin. The cameras made conscientious people reluctant to pull the trigger." Asked whether, if he had a choice, he would have preferred to try the case with or without the cameras in the courtroom, Mr. Sosney replied: "The use of cameras is not only unfair to the people of Wisconsin, it adds an unneeded expense to the trial of cases. For example, the jurors were sequestered in this case, when they otherwise would not have been." Finally, in response to the query as to whether the use of cameras had any overall advantages, our observer quotes the

prosecutor as follows: "*None.* There is not a need for the extra coverage allowed by the use of cameras. The media are there only to present sensational issues to the public, not to satisfy the public's need to know. This is well illustrated by the manner in which the cameras have been used up to this time." *Id.*, at 33.

**GOVERNOR'S DADE COUNTY ADVISORY COMMITTEE**

DADE COUNTY COURTHOUSE
73 W. Flagler
Miami, Florida

July 8, 1980
6:00 o'clock p.m.

EXCERPT OF
KENNETH I. HARMS
CHIEF OF POLICE.

THEREUPON:

KENNETH I. HARMS

was called as a witness, and, after having been first duly sworn, was examined and testified as follows:

BY MR. BLOCK:

Chief, for the record, will you please give us your official title?

BY CHIEF HARMS:

Chief of Police of the City of Miami Police Department.

* * * * *

BY MR. BLOCK:

Are you suggesting, and don't let me put words in your mouth, that the media had anything to do with causing the riots?

BY CHIEF HARMS:

I most certainly am.

BY MR. BLOCK:

Are you suggesting that the media's coverage of the McDuffie trial contributed to the riots, the disturbances, or the rebellion?

BY CHIEF HARMS:

Absolutely.

Understand that this is a prospective that I am sharing with you, and this is based on the fact that I am a lifelong resident of Dade County, and I have been involved with the Criminal Justice System here within this community for in excess of twenty years. It is a professional judgment and it is a personal judgment.

* * * * *

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

[Officers and seal omitted]

## RESOLUTION

OF THE

ANNUAL GENERAL MEMBERSHIP
BUSINESS MEETING

WHEREAS, traditionally cameras and recording devices have been excluded from courtrooms in virtually all jurisdictions, and

WHEREAS, the members of the National Association of Criminal Defense Lawyers, Inc., as a group of persons regularly involved in the trial of criminal cases believe that the use of such devices at present could tend to impair the integrity of jury trials because of potential and as yet undetermined effects upon witnesses, jurors, defendants, judges and lawyers, and

WHEREAS, there do not at present appear to be any corresponding benefits to be derived from introduction of such devices into trial courtrooms, now therefore,

BE IT RESOLVED, that the National Association of Criminal Defense Lawyers, Inc. declares its opposition to the use of cameras and recording equipment in all criminal trials.

/s/ C. ANTHONY FRILOUX, JR.
President

OFFICE OF DISTRICT ATTORNEY
MILWAUKEE COUNTY
E. Michael McCann District Attorney

[Seal of Office and address omitted]

October 10, 1980

Mr. Joel Hirschhorn
Attorney at Law
742 Northwest 12 Avenue
Miami, FL 33136

Re: *Chandler v. Florida and State of Wisconsin v. James Ray Mendoza*

Dear Mr. Hirschhorn:

Jon Genrich has kept me closely posted as to the correspondence between you and him. As you know, we are profoundly committed to the position that cameras should be excluded from the court when vetoed by the defendant.

Please feel free to use any of the materials forwarded to you by this office in any manner in which you would feel useful.

I also wish to assure you of my belief after seeing a number of instances where cameras appeared in court that justice is not well served by the admission of television cameras to the courtroom.

As an elected official, I can fully appreciate the unique opportunities for political advancement provided to a district attorney or judge by having cameras cover a notorious case. I for one firmly believe that the presence of cameras in a celebrated case inevitably obliquely or directly applies pressure to a juror to deliver a verdict of guilty. I profoundly

respect the jury system and do not casually ascribe pusillanious expectations to citizens sitting in judgment on another citizen. At the same time, my experience of human nature observed from fifteen years in the working pits of a prosecutor's office convinces me that some sensitive jurors may experience unstated pressures from the presence of the cameras. A defendant is entitled to have all jurors free from any extraneous pressure other than the oath which they take.

I note that an amicus brief has been filed by a number of Attorneys General supporting the cameras in court concept. In the abstract, from the often halcyon upper reaches of an Attorney General's office, the proposal may seem attractive from a "right to know" approach. At the same time, I know Mr. La Follette personally and have always found him to be a man of exceptional commitment to justice. I strongly suspect that were he to be privy to some of the excesses I have already witnessed by cameramen in the court he would change his position on the issue.

The local media has uniformly opposed our position. We neither seek nor curry anyone's favor by our continued stand in favor of the defendant's right to a fair trial. John Donne said it best when he noted that no man is an island. I weep when any man's right to a fair trial is tolled for I do not doubt that with that tolling every man's right is lost.

Sincerely yours,

/s/ E. MICHAEL McCANN
E. Michael McCann
District Attorney

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RICHARD C. McFARLAIN
Attorney at Law

[Address and office notation of receipt omitted]

June 8, 1977

The Honorable Alan C. Sundberg
Justice, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Cameras in the Courtroom — Noise Level of Camera Clicks

Dear Mr. Justice Sundberg:

Please refer to Hon. C. Gary Williams' letter to you dated June 1, 1977.

So we have come to this. Apparently the argument has foundered to the point of whether the "Miami Herald" can stop Nikons cricking in court or whether this can be overcome by the use of a blimp. I have always been big on blimps myself; the bigger they are the more I like them.

May I suggest as a compromise that Nikons be allowed to use blimps provided that they have a cap over the lens to insure the blimp gives no distortion to the photograph. To give Leicas equality, they too should remain covered and may use blimps (dirigibles for the larger ones) if they wish.

I trust the recipients of this letter will signify their support or nonsupport in the usual manner in this unusual case and that this issue will be resolved quickly.

The questions remain, however, of; 1) what we are going to do to stop the television industry from turning judges green

when they run their clips on the evening news; 2) can trial judges wear pastel robes in an attempt to counterbalance this perfidious move towards the greening of the judiciary; and who gets the residuals?

Respectfully,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

---

DR. HELEN PENNER ACKERMAN, ED.D.
Licensed Psychologist

[Address and Florida Supreme Court Clerk's notation of filing omitted.]

December 16, 1977

Justices
Supreme Court of the State of Florida
Tallahassee, Florida 32304

Dear Sirs:

I have enclosed a copy of a comment which will be published in a professional psychological journal. Also enclosed is a copy of a letter to me from Dr. Joseph Sanders of the American Psychological Association. I do wish to suggest that as you evaluate the role of the television camera in the courtroom,

you consider having input from the Florida Psychological Association and its members. Thank you for considering comments from professional organizations.

Sincerely,

/s/ HELEN ACKERMAN
Helen Ackerman

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Law Offices

McFARLAIN AND BOBO

[Firm members names, address and telephone number omitted.]

June 14, 1978

Joel Hirschhorn, Esq.
Hirschhorn and Freeman
742 Northwest 12th Avenue
Miami, Florida 33136

Dear Mr. Hirschhorn:

Thank you for your letter of June 9. I truly regret missing your oral argument in the recent Cameras in the Courtroom case, but was tied down with the end of the legislative session.

You inquire regarding the use of Professors Miller and Brigham. Justice Sundberg tried to arrange some kind of academic review by those gentlemen, as well as people at the University of Florida, but, to the best of my knowledge, nothing came of it. He may now be in a position to have some professorial unit study the results so far, but I have not asked him.

I did attend a "viewing" in the basement of the Supreme Court which the Court attended as well as counsel for the television station, where a station was showing what was supposed to be highlights of the year. It was as dismal a performance as I have ever seen, and several of the members of the Court were amused at the results. Other than that, all I know of what has been happening is that Judge Baker, who loves show biz, is writing learned memos on how marvelous the Zamora trial was, and other judges who are hot to trot to put on greasepaint and try the case, are using whatever influence they have to convince the court that this whole thing is marvelous.

An attempt or two has been made to pull the rug out from under me as counsel for the Bar in this case. Judith Kreeger, whose firm represents some television interests in Miami, is Chairman of a Bar Committee, that, unbeknownst to me, sat in judgment on this issue. I wrote her a letter, copy enclosed, but it didn't do any good, though she read it to the committee. It is my understanding they ended up with a tie vote and are in a quandary now, which is a good place for a Bar Committee on this subject.

I encourage you in your work. I have no objection to your using any correspondence of mine. I do fear that the camel now has his nose under the flap of the tent and pretty soon the hump is going to be in with him and we are all going to be out in the cold in the desert while TV runs the show.

With best wishes, I am

Very truly yours,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

---

ALICE M. PADAWER-SINGER, Ph.D.
130 East 67 Street
New York, N.Y. 10021

(212) 737-7897

July 7, 1978

J. Hirschhorn, Esq.
Hirschhorn & Freeman, P.A.
742 Northwest 12th Avenue
25 West Flagler Street
Miami, Florida 33136

Dear Mr. Hirschhorn:

As you know, I have conducted various studies of jurors in courts, including the Free Press-Fair Trial Study and decision

making in the twelve-vs.-six-Member Juries under Unanimous vs. Non-Unanimous Juries.

As per your report, I am enclosing the last article published which summarizes some of my studies. This article was written at the invitation of the American Trial Lawyers Association-Rosco Pound Foundation Annual Meeting in 1977.

I am enclosing my vita for your information re other publications. I have been invited to organize a conference for judges at the American Bar Association Conference on August 8, 1978 from 9:30 A.M. to 12 Noon, and will present research data.

I believe that it is imperative that a study evaluating the effects of TV cameras in court on the behavior of participants in a trial should be conducted before one can give a blanket approval or disapproval. It is important to ascertain under what circumstances should trials be televised and/or what modifications in televising should be included in a decision to allow cameras in court. I am most interested in directing and conducting such a study.

Please keep me informed.

Sincerely yours,

/s/ ALICE M. PADAWER-SINGER
Alice M. Padawer-Singer

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Department of
COMMUNICATION

The University of Michigan
Ann Arbor, Michigan 48109

7 August 1980

Joel Hirschhorn, P.A.
Attorney at Law
742 Northwest 12th Avenue
Miami, Florida 33136

Dear Joel:

Enclosed, as you requested, are copies of several documents related to my proposed *controlled* experiment on the issue of cameras in the courtroom. Included are a description of the experiment, an abstract of the proposed study, and correspondence with various members of the judiciary in Indiana and Michigan. I have been trying for several years (first in Indiana and now in Michigan) to get approval from the state supreme courts for the study. Tentative approval from the chief justice of Indiana was withdrawn after I secured the cooperation of trial judges.

My proposed study would differ from so-called "experiments" conducted or under way in several states in two fundamental and significant respects. (1) Other variables or factors would be held constant while the crucial or independent variables to be tested (such as the presence or absence of cameras) would be manipulated or changed. (2) Aspects of the behavior of trial participants under those differing conditions would be actually and reliably measured.

To the best of my knowledge, none of the pilot programs masquerading as "experiments" in various states has measured the behavior of trial participants (with cameras absent and present) in a scientifically valid manner. With a very few notable and more sophisticated exceptions, the

procedure with most of those so-called "experiments" has been merely to allow the cameras in the courtroom, and then *ask* various participants whether they were affected by the cameras. Such a procedure is inadequate, laughable, or both. Surely most attorneys *and* journalists have had the experience of questioning a person who would say one thing in public and the exact opposite in private.

As you know, the research for my doctoral dissertation on the issue of cameras in the courtroom is complete, but the data are yet to be analyzed and the document written. In the dissertation, I will examine several aspects of two sensational murder trials in Indianapolis. Defendants for the same crimes were granted separate trials; television cameras had access to one of the trials and were excluded from the other. Although the findings will be interesting, they are not ready and they will not be definitive. Although those two trials provided an opportunity for a study far more rigorous than most of those being referred to as "experiments" elsewhere, too many variables remained uncontrolled. The data must be cautiously interpreted.

I regret that I cannot provide you (and others) with some scientifically valid data that clearly show what impact and presence of cameras has on trial participants. But I am cheered by the fact that no one else can either. Such data, to the best of my knowledge, do not exist.

Yours sincerely,

/s/ DALTON LANCASTER
Dalton Lancaster
Assistant Professor

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[Handwritten letter addressed to]
Judges: Supreme Court — Florida
[bearing the stamp,] " Filed: Dec. 5, 1978
Clerk, Supreme Court"

Gentlemen:

We sincerely hope that you will have the integrity to forbid televising in courtrooms.

Television is primarily an entertainment medium, and it is unjust to bring anyone to trial in its eye.

As for Justice — she should remain blindfolded — not have one eye peeking at TV cameras. Lawyers, and some judges may enjoy acting in front of TV, but the person on trial should not be under that added strain.

It will be a sad day indeed if Florida adds courtroom trials to its tourist attractions.

Sincerely,

/s/ MR. AND MRS. J. W. LIVINGSTON
522 Shell Point
Fort Myers, Florida 33908

Nov. 20'78

JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,

*Appellants,*

*against*

THE STATE OF FLORIDA,

*Appellee.*

On Appeal from the Supreme Court of Florida

## BRIEF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AS *AMICUS CURIAE*

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IN THE

# Supreme Court of the United States

**October Term, 1979**

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**No. 79-1260**

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NOEL CHANDLER and ROBERT GRANGER,

*Appellants,*

*against*

THE STATE OF FLORIDA,

*Appellee.*

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**On Appeal from the Supreme Court of Florida**

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## BRIEF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AS *AMICUS CURIAE*

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties submitted herewith.

### Interest of the *Amicus Curiae*

The American College of Trial Lawyers is a national organization of lawyers skilled and experienced in the trial of cases, concerned with the improvement and the enhancement of the standards of trial practice, the administration

of justice and the ethics of the trial branch of the profession. Its members are carefully selected by an elaborate nominating and screening procedure from lawyers with high standards who have engaged in trial practice for at least fifteen years. Membership is limited to not more than 1% of the lawyers licensed to practice in a state. The College has deep concern with the maintenance of fair trials and the protection of the constitutional rights of litigants.

This concern leads the College to present to the Court its views on the nature of a criminal defendant's right to a fair trial and the impact of television thereon. The College has formally expressed its opposition to the use of television in trial or appellate proceedings.* The College is concerned at the current rush of authorities in some states, responding to the intense pressure exerted by the media for many years, toward televising all judicial proceedings. It believes that this practice is fraught with dangers to the right of criminal defendants to a fair trial in ways hard to demonstrate by empirical evidence or to test by usual methods of appellate review. The College urges the Court to announce, firmly and unmistakably, its opposition to provisions which permit the televising of judicial proceedings, such as Canon 3A(7) of the Code of Judicial Conduct of the State of Florida, 32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.), in order to safeguard the fundamental

* In August, 1979 the Board of Regents of the American College of Trial Lawyers (its governing body) adopted the following resolution:

> The American College of Trial Lawyers expresses strong opposition to the use of television in trial or appellate proceedings as being wholly inconsistent with the right of the parties to a fair trial or a fair appellate hearing and as being incompatible with the interests of justice.

guarantee of a fair trial contained in the Sixth and Fourteenth Amendments to the Constitution of the United States.

## Summary of Argument

Appellants were denied their right to a fair trial under the due process clause of the Fourteenth Amendment by the presence of television cameras in the courtroom and the broadcast news coverage of their trial over their objection. Included within this right to a fair trial are the Sixth Amendment guarantees of the right to an impartial jury and judge, the right of confrontation and the right to counsel. Courtroom television of trials is fundamentally inconsistent with these guarantees because of the adverse impact of television, which has been documented, on each of the participants in a criminal trial—the jurors, the witnesses, the judge and the defendant.

The First Amendment guarantee of freedom of the press and the Sixth Amendment right of public trial do not imply any constitutional right to the presence of television cameras in the courtroom. The right of a public trial is a defendant's right, intended for his protection. The right of access of the press to judicial proceedings is no greater than that of the public itself. What is involved here is not freedom of expression but the regulation of access to the courtroom by certain media equipment. The right of an individual defendant to a fair trial is too important to be subordinated to competing interests.

The chief objective of a trial, to ascertain the truth, is not fostered by the use of television in the courtroom. The

educational benefits and increased public understanding of judicial proceedings purported to be gained by the use of television are both speculative and secondary to the purpose of a trial. Not only will televising trials not provide the benefits claimed, but any benefits are far outweighed by the instances of prejudice and abridgement of the rights of the criminally accused.

## ARGUMENT

### POINT I

**The presence of television cameras and other broadcast equipment in the courtroom denied appellants their right to a fair trial.**

The due process clause of the Fourteenth Amendment guarantees the accused those fundamental rights which are essential to a fair trial. *Estelle* v. *Williams,* 425 U.S. 501 (1976); *Drope* v. *Missouri,* 420 U.S. 162 (1975). The right to an impartial jury, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Turner* v. *Louisiana,* 379 U.S. 466 (1965), the right of confrontation, *Pointer* v. *Texas,* 380 U.S. 400 (1965), and the right of representation by counsel, *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), have all been held specifically applicable to the states and within the embrace of the Fourteenth Amendment's guarantee. These fundamental rights, however, are necessarily impaired by the presence of television cameras in the courtroom.

In *Estes* v. *Texas,* 381 U.S. 532 (1965) [hereinafter cited as *Estes*], this Court was faced with much the same question as the instant case presents. There, the defendant,

Billie Sol Estes, was convicted of having induced farmers in Texas to purchase fertilizer tanks and equipment which did not exist and to deliver to him chattel mortgages on the fictitious property. Because of his associations with prominent Texas politicians, Estes' trial generated a great deal of media attention, and was televised over his objection. This Court reversed that conviction, holding that the presence of television cameras in the trial courtroom introduced into the proceedings a factor so at odds with the fundamental purpose of a criminal trial and so inherently prejudicial to the defendant's rights as to amount to a denial of due process.*

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* The American Bar Association filed a brief *amicus curiae* in the *Estes* case, urging reversal there because of the prejudicial impact on a defendant's rights of televising a criminal trial. As that brief noted (at pp. 3-8), the American Bar Association has consistently opposed televising judicial proceedings since the adoption of Canon 35 of the Canons of Judicial Ethics in 1937. See *Estes, supra,* 381 U.S. at 596-601 (Harlan, J., concurring) for an account of the development of Canon 35 from its adoption in 1937 to its reaffirmation by the House of Delegates in February, 1963.

Since 1963, the American Bar Association has, on several occasions, restated its opposition to the presence of television cameras in the courtroom. In 1972, the House of Delegates adopted the present Code of Judicial Conduct, which incorporates, in Canon 3A(7), the prohibitions of former Canon 35. Canon 3A(7) provides:

> A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
>
> (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
>
> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
>
> (i) the means of recording will not distract participants or impair the dignity of the proceedings;

*(footnote continued on next page)*

Certain comments by Mr. Justice Clark, writing for the Court, *see* 381 U.S. at 551-52, and Mr. Justice Harlan, in his separate concurrence, *see* 381 U.S. at 595-96, have been seized upon by television's advocates as indicating that technological advances made in television equipment since 1965 have vitiated the Court's finding of prejudice. It is argued that new cameras which can be operated without kleig lights and placed at "unobtrusive" locations in the courtroom, will have no adverse impact on the trial process. Indeed, these portions of the *Estes* opinion were referred to specifically by the Florida Supreme Court in its opinion in *In re Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 773 (Fla. 1979), which approved the modification of Canon 3A(7) of the Code of Judicial Conduct of the State

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(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Since 1972 the American Bar Association has twice affirmed its support of Canon 3A(7). In August, 1975 the Task Force on Courts and the Public proposed that " 'there be referred to the appropriate committee . . . the question of revision of Canon 3A(7) of the Code of Judicial Conduct to permit electronic news media to cover courtroom proceedings.' " The House of Delegates rejected the proposal by voice vote. *Courtroom TV Study Turned Down,* 61 A.B.A.J. 1085 (1975).

In February, 1979 the House of Delegates rejected a proposal by the Committee on Association Standards for Criminal Justice to allow the highest appellate courts of the various state and federal jurisdictions to exercise supervisory authority by rule to permit electronic coverage of judicial proceedings. *Cameras Out of Courtrooms?,* 65 A.B.A.J. 304 (1979).

These actions clearly demonstrate the continued opposition of the American Bar Association to the televising of criminal trials.

of Florida, 32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.), to permit television coverage of judicial proceedings.

*Estes* cannot, however, be so conveniently thrust aside, nor may its constitutional holding be so drastically curtailed, for neither Mr. Justice Clark nor Mr. Justice Harlan held the fair trial right of the criminally accused hostage to technological improvements in the hardware of electronic journalism. The opinion of the Court clearly sets forth the restrictions which had been placed on the cameras during the *Estes* trial:

> A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.
>
> . . . [L]ive telecasting was prohibited during a great portion of the actual trial. Only the opening and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury. 381 U.S. at 537 (footnote omitted).

Mr. Justice Harlan also commented upon the physical setting:

> Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial —relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom. 381 U.S. at 588.*

For the *Estes* Court, then, the constitutional objections to televising a criminal trial stemmed not from physical disruption (although that may, of course, deprive a defendant of a fair trial), but from the probability that the mere presence of cameras and recording devices in the court-

* Mr. Justice Harlan limited his holding in *Estes* to "notorious" cases. However, he was uncertain that that limitation was meaningful, since "it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice [in a 'run-of-the-mill' case], though less severe, are nonetheless of constitutional proportions." 381 U.S. at 590. That limitation is not relevant to this case, since, as appellants note, their status as police officers and the unusual tape recordings made by a "ham" radio operator, which were admitted into evidence, made the trial below a most newsworthy event. It is submitted, however, that the unconstitutionally prejudicial impact of television upon the trial process should not be made dependent upon the notoriety of the accused or the lurid nature of his crime. It is the untoward effect of television upon the institutional functioning of the criminal trial which creates constitutional difficulty.

room would have an effect on the trial participants prejudicial to the accused:

> . . . [A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison*, 349 U.S. 133 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> > "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U.S. 11, 14." At 136. (Emphasis supplied.)
>
> And, as Chief Justice Taft said in *Tumey* v. *Ohio*, 273 U.S. 510, almost 30 years before:
>
> > "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict a defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." At 532. (Emphasis supplied.)
>
> 381 U.S. at 542-43.

These concerns were also of paramount importance for Mr. Justice Harlan:

> Courtroom television introduces into the conduct of a criminal trial the element of professional "showmanship," an extraneous influence whose subtle capacities

> for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. 381 U.S. at 591.

The *Estes* Court identified four major areas in which the presence of the television camera "might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge." 381 U.S. at 545. The situations specified were the effects of courtroom television on the jurors, the witnesses, the trial judge and the defendant. *Id.* at 545-50. Although television's advocates frequently contend that the possibilities for prejudice noted by the *Estes* Court lack empirical proof and are the overwrought product of simple resistance to change, results of psychological studies and the *very statistics* concerning the effects of courtroom television compiled and relied upon by the Florida Supreme Court* to support the televising of trials actually show that television does have an impact upon each of the participants in a trial, and hence does create the inherent prejudice which was at the heart of the *Estes* Court's decision.

**1. Impact on the Jury.**

The Sixth Amendment guarantee of "trial, by an impartial jury" is a right of fundamental importance, and is binding on the States through the Fourteenth Amendment. *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).

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* A Sample Survey of the Attitudes of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978, prepared by The Judicial Planning Coordination Unit, Office of the State Courts Administrator. *See In re Post-Newsweek Stations, Florida, Inc., supra,* 370 So.2d at 767-69.

These statistics are compiled in Part IIA(1) (Survey Results—Frequencies) of the Survey [hereinafter cited by reference to § and question within Part IIA(1)].

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors . . . "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961).

Initially, potential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pretrial hearings and motions from which the jury is ordinarily excluded. Hence, evidence otherwise inadmissible may leave an indelible mark.

Once the trial begins, jurors' exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. *Estes, supra,* 381 U.S. at 546; *see* Cantrall, *A Country Lawyer Looks at Canon 35,* 47 A.B.A.J. 761, 763 (1961).

Even though the trial court may give repeated warnings to the jury not to discuss the case, and even though conscientious jurors may heed an admonition not to watch television reports dealing with the case on trial before them (reports which are likely to be woven into news

programs with little or no advance warning to the viewer), it seems undeniable that jurors will be subject to the pressures of television-watching family, friends and, indeed, strangers. "We lawyers know that unfortunately a word dropped outside the courthouse to a juror sometimes has more influence than the evidence itself." Tinkham, *The Bar and Canon 35,* 19 F.R.D. 19, 24 (1955). Additionally, in the absence of a rule prohibiting filming of jurors themselves, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing strangers, or perhaps harried by intruding telephone calls.

Psychological studies have repeatedly shown that the cloak of anonymity is the surest guarantee of independence in a decision-making process such as a jury trial.* Intrusion of the television camera into the courtroom, particularly in a controversial or highly-publicized trial, may threaten the jurors' ability to arrive at a fair and independent determination by simultaneously robbing them of their anonymity and reminding them of the intense public interest in the trial.

A report of a study by Dr. J. N. Finkelstein, a University of Washington clinical psychologist, noted that

> "A series of studies done by social psychologists in the 1960's . . . found that the more 'public' a decision was, the more likely individuals would

* Mouton, Blake and Olmstead, *The Relationship between Frequency of Yielding and the Disclosure of Personal Identity,* 24 Journal of Personality 339 (1956); Raven, *Social Influence on Opinions and the Communication of Related Content,* 58 The Journal of Abnormal and Social Psychology 119 (1959).

> form their opinion to what they believed the group believed."

> And Dr. Finkelstein noted that televising a trial which the public believes should end in conviction is an external pressure to convict. Murphy, *Trend to Televised Court Proceedings: A Step That Needs Time and Study,* New York Law Journal, Jan. 25, 1979, at 25, col. 3, at 27, col. 2.

Mass opinion conveyed through the peering lens of the camera is surely "anathema to the very conception of a fair trial." Douglas, *The Public Trial and the Free Press,* 46 A.B.A.J. 840, 844 (1960).

Another problem, and one which is particularly difficult to assess, is that of jury distraction. Although disruptions caused by the physical presence of cameras and cameramen in the courtroom may be controlled by technological advances and supervision by the trial judge, the simple awareness by jurors that they are being televised will have an ongoing impact throughout the course of the trial.

> Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony. *Estes, supra,* 381 U.S. at 546.

The Florida Supreme Court's own statistics are most enlightening on the effect of television on jurors. Indeed, it is difficult to understand how the Florida Court could have disregarded these statistics, as it appears to have done. In response to questions asking whether the presence of cameras and other equipment in the courtroom affected the jury, fully one-third of the jurors surveyed replied that they felt at least "slightly" self-conscious,* while

* § 1, question 9.

41% of the attorneys and 35% of the court personnel surveyed stated that jurors were caused to be "moderately" to "extremely" self-conscious because of the camera's presence.* Asked whether they were distracted by the cameras, more than 23% of the jurors responded that they were at least "slightly" distracted.** In response to a similar question, 33% of the attorneys and 25% of the court personnel replied that jurors were "moderately" to "extremely" distracted.† Similarly, more than 25% of the jurors admitted that they were made at least "slightly" nervous by the camera's presence.‡ Of the attorneys surveyed, 29% felt the cameras made jurors "moderately" to "extremely" nervous; 30% of the court personnel responding agreed.¶

The only possible solution to this difficult problem would be to require the sequestration of all juries in televised cases. We submit, however, that this would constitute an inordinate financial burden on the state, and an undue imposition on individual jurors.

Ultimately, television will preclude the rendering of an impartial verdict in those cases most in need of disinterested adjudication and most likely to be televised—the criminal

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* § 3, question 13; an additional 26.4% of attorneys and 36% of court officers surveyed found jurors to be "slightly" nervous because of cameras present in the courtroom.

** § 1, question 13.

† § 3, question 16; another 30.8% of attorneys and 28% of court personnel felt jurors were "slightly" distracted by the cameras.

‡ § 1, question 11.

¶ § 3, question 15; an additional 28% of attorneys and 29% of court personnel found jurors "slightly" nervous because of cameras in the courtroom.

trial of an unpopular or infamous defendant. The familiar truism should be applied here—the rights of all are secure only if the rights of the most detested are vindicated according to the rule of law.

**2. Impact on the Trial Judge.**

The trial judge plays a pivotal role in sustaining the atmosphere of impartiality mandated by the Sixth and Fourteenth Amendments. *See Glasser* v. *United States,* 315 U.S. 60, 82 (1942). His difficult task, one which requires his undivided attention, is to make certain that the accused receives a fair trial. This requirement of an impartial judge attending to the administration of the trial and the adjudication of testimony and argument without extraneous influence is incompatible with the distractions of television. When the television cameras enter the courtroom, the trial judge must supervise them. The problem of the divided attention of the trial judge was a factor cited by the *Estes* Court in reversing the conviction in that case. 381 U.S. at 548.

The experience of Florida's trial judges in attempting to supervise televised trials is most illuminating. The judges of the Florida Circuit Courts reported that they

> were required in many instances to spend inordinate amounts of time seeing that guidelines were being followed and contacting the media designated representative, particularly with reference to media activities and congestion in the hallways and at the monitor stations.
>
> * * *
>
> Most of the court proceedings in which the media has shown an interest during the experimental period

> are those in which the demands on the court's time, legal knowledge, concentration and patience are already greatly burdened and taxed.
>
> * * *
>
> The presence of the media and the resolution of conflicts caused by their presence has greatly taxed the trial court, adding hours, sometimes days, to his task. Report of the Florida Conference of Circuit Judges at 10-11.

The Circuit Court Judges opposed modification of Florida Canon 3A(7) to permit televising judicial proceedings. *See In re Post-Newsweek Stations, Florida, Inc., supra,* 370 So.2d at 770.

Aside from the additional burdens placed upon the trial judge in supervising media conduct in the courtroom, it is clear that the news media can bring tremendous pressure on the trial judge to permit televising of proceedings in his courtroom. Such pressure is bound to affect the judge's outlook: if he decides not to allow television, he will be subjected to the charge of discrimination and being old fashioned. Such pressure can be used as a crude political weapon through the media's power to shape public opinion where judges are elected. Pressure of this sort on individual judges will only intensify where one judge in a state or district allows the cameras into his courtroom. *See Estes, supra,* 381 U.S. at 548-49; Graham & Fretz, *Cameras in the Courtroom: A Dialogue,* 64 A.B.A.J. 545, 549 (1978); Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered,* 48 A.B.A.J. 615 (1962).

To adhere to Lord Mansfield's classic standard of the impartial and independent judge:

> I wish popularity: but, it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press; I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. *Rex* v. *Wilkes,* 4 Burrow's 2527, 2562 (K.B. 1770)

would be difficult, if not impossible, when the pressure of public opinion is brought to white heat by television.

Finally, it is not unfair to recall that judges too are human, and may be subject to distractions from the business at hand simply from an awareness of being televised.

**3. Impact on Witnesses.**

The Sixth Amendment provides that the accused in a criminal trial shall have the right "to be confronted with the witnesses against him." This right of confrontation consists of the traditional right to cross-examine adverse witnesses. *See* 5 Wigmore, *Evidence* § 1397 (Chadbourn Rev. 1974). This right to confront and cross-examine, as well as to introduce rebuttal testimony, is stripped of all meaning when a trial is televised.

The practicing lawyer knows the difficulty of arranging the attendance of witnesses. They are often afraid, un-

accustomed to appearing or speaking in public, and plagued by the gnawing doubt that they will be unable "to do justice to the facts and to themselves." Cantrall, *A Country Lawyer Looks at Canon 35, supra,* 47 A.B.A.J. 761. Already reluctant, the potential witness facing the possibility of being televised "for the world to see his struggle to express himself and to outwit the cross-examiner" will be that much more unavailable. *Id.* The timid will inevitably shrink from attendance, while the outgoing will fear that momentary lapse or gesture—amusing or ridiculous for all to see—caught and fastened by the camera, for the possible entertainment of millions. To have to subpoena the reluctant witness to compel him to undergo the publicity he dreads will only heighten the already distracting presence of the television lens. *Id.*

These fears do not exist in a vacuum. The Report of the Florida Conference of Circuit Judges cites one case in which government witnesses, then in prison, "were reluctant to testify in front of a camera for fear of their safety on return to prison. One such witness was held in contempt for refusing to testify under those conditions." Report of the Florida Conference of Circuit Judges, *supra,* at 15.

Once he begins to testify, the witness who does appear will be ever conscious of being televised not only on direct examination but, significantly, on cross-examination where he will be embarrassingly forced to retrace his steps and less likely to recant under the gaze of such a vast audience. The operation of this adversary prodding, designed as it is for getting that much closer to the truth, is difficult

enough under normal courtroom circumstances, but is completely thwarted by the camera's gaze.

Concern that the quality of testimony in criminal trials might be adversely affected by the presence of television was central to the decision in *Estes*. *See* 381 U.S. at 547-48, 591. It is a concern borne out both by psychological studies* and by the Florida Supreme Court's survey results. When asked if the presence of cameras and other equipment in the courtroom made them feel self-conscious, nearly 54% of the witnesses responding admitted that they were affected at least "slightly,"** and nearly 29% said they felt "moderately" or "extremely" self-conscious. In response to a similar question, 48.5% of the court personnel and 47% of the attorneys surveyed replied that witnesses were made "moderately" to "extremely" self-conscious by the camera.† Asked if the camera made them nervous, 46.7% of the witnesses stated that they felt at least "slightly" nervous;‡ 43% of the attorneys and 34% of the court personnel responded that the witnesses were "moderately" to "extremely" nervous before the camera.¶ And 39.4% of the witnesses responding stated that they were at least "slightly" distracted by the cam-

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* *See, e.g.*, Lezak, *Some Psychological Limitations on Witness Reliability*, 20 Wayne L. Rev. 117 (1973).

** § 1, question 9.

† § 3, question 1; in addition 36.9% of the court personnel and 28.4% of the attorneys responded that witnesses were made "slightly" self-conscious by the camera.

‡ § 1, question 11.

¶ § 3, question 3; an additional 32.6% of attorneys and 43.7% of court personnel felt the witnesses were "slightly" nervous when on camera.

/

eras,* while 34.5% of the attorneys and 24% of the court personnel felt that cameras were "moderately" to "extremely" distracting to witnesses.**

Perhaps most disturbing, 56% of the lawyers and 55.5% of the court personnel responding felt that witnesses were at least "slightly" *inhibited* by the camera's presence.† These statistics show only too plainly that the concerns of the *Estes* Court were not mere idle speculation.

Finally, televising the testimony of trial witnesses completely vitiates the rule against the presence of witnesses in the courtroom, since the testimony of a prospective witness will just as surely be contaminated by watching the televised performances of those who precede him on the stand. *Estes, supra,* 381 U.S. at 547.

**4. Impact on the Defendant.**

The impact of courtroom television may well hit hardest on the defendant himself. Indeed, the *Estes* Court went so far as to label the camera's presence "a form of mental —if not physical—harassment, resembling a police line-up or the third degree." 381 U.S. at 549. The television cameras may also have an adverse effect on a defendant's willingness to testify, and make him less able to give perhaps crucial testimony to the jury in a convincing manner.

Further, telecasting may also deprive the defendant of the right to the effective assistance of counsel. *Estes,*

* § 1, question 13.

** § 3, question 6; 40% of court personnel and 28.3% of attorneys felt witnesses were "slightly" distracted by the cameras.

† § 3, question 7.

*supra,* 381 U.S. at 549. Counsel cannot represent conflicting interests or owe loyalty elsewhere without violating a defendant's Sixth Amendment guarantee of "assistance" and, therefore, his Fourteenth Amendment due process protection. *See Glasser* v. *United States, supra,* 315 U.S. at 70; *see also Von Moltke* v. *Gillies,* 332 U.S. 708, 725-26 (1948). Nor is a defendant adequately represented if counsel is so impeded by his estimation of the facts that his conscience prevents him from arguing before the jury on behalf of his client. *See Johns* v. *Smyth,* 176 F. Supp. 949 (E.D. Va. 1959). The transformation of the courtroom into a "moving picture theater" is a distraction which cannot help but unconstitutionally impair the undivided effectiveness of counsel.

More broadly, lawyers, like others, may be affected by the presence of television cameras and become concerned, if only subconsciously, with their appearance to the world, rather than thinking only of doing whatever is necessary, however unpopular that may be, to protect the rights of their client on trial. *See* Douglas, *The Public Trial and the Free Press, supra,* 46 A.B.A.J. at 842. What might normally be courtroom drama can easily turn into a prejudicial spectacle at the camera's prompting. *See generally* Tinkham, *Should Canon 35 Be Amended?,* 42 A.B.A.J. 843 (1956). The already sensational atmosphere generated by the fact that a particular case is television-worthy might sometimes encourage an elected prosecutor or a defense counsel to concentrate on the larger stage rather than devote every ounce of energy and thought to the cause on trial and the interests he represents there.*

* Although argument here has focused upon the rights of the accused, the State also has an important interest in the unaffected functioning of the trial process. Prosecution of defendants who have received extensive and sympathetic media coverage can only be hampered by the injection of television into the courtroom.

## POINT II

**The guarantees of free press and public trial do not require the admission of television cameras to the courtroom.**

Those who favor the presence of television cameras in the courtroom frequently argue that this is necessary to effectuate the First Amendment guarantee of freedom of the press and the Sixth Amendment right of public trial. Both of these assertions fail when examined.

This Court has consistently held that the press (including the electronic media) enjoys no greater right of access to judicial proceedings than the public itself. *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 609-10 (1978); *Branzburg* v. *Hayes,* 408 U.S. 665, 684 (1972); *cf. Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978); *Pell* v. *Procunier,* 417 U.S. 817 (1974). This rule has been emphatically restated in *Gannett Co.* v. *DePasquale,* 443 U.S. 368 (1979). There, this Court upheld exclusion of the press from a pretrial suppression hearing, finding "the public trial guarantee as one created for the benefit of the defendant", not the press. 443 U.S. at 380.

Freedom of the press protects the right to disseminate ideas and, specifically, to publicize what reporters have seen and heard in the courtroom. *See Sheppard* v. *Maxwell, supra,* 384 U.S. at 362-63. As Mr. Justice Harlan noted in *Estes, supra,* 381 U.S. at 589:

> The rights to print and speak, over television as elsewhere, do not embody an independent right to bring

> the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

It should also be noted that restrictions on press access have been upheld in many other contexts. *Nixon* v. *Warner Communications, Inc., supra* (no special right of access by press to Watergate tapes played in open court); *Houchins* v. *KQED, Inc., supra; Pell* v. *Procunier, supra; Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974) (no special right of access by press to prison facilities or inmates); *cf. Zemel* v. *Rusk*, 381 U.S. 1 (1965) (no special right to travel to Cuba in violation of State Department travel restrictions).

Since the right of courtroom access by the press is no greater than that of the public generally, and since the presence of television poses such grave hazards to the right of the accused to a fair trial, it is clear that there is no right of constitutional dimension requiring the presence of the implements of electronic journalism in the courtroom.

## POINT III

**Televising judicial proceedings will not achieve the goals its advocates claim.**

To argue that television cameras have no proper place in the courtroom is not to say that a free press, including the electronic media, does not play an important role in our constitutional scheme, or that the interests of the press in being present (without cameras) at a criminal trial should not be taken into account. *See Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 397-403 (Powell, J., concurring). However, some television advocates argue that the educational benefits and increased public understanding and acceptance of the judicial process to be obtained from the cameras' presence far outweigh any isolated instances of prejudice which may occur. These arguments, however, overlook the fact that the prejudice inherent in televising criminal proceedings often may not be identifiable. *Estes, supra,* 381 U.S. at 544. Further, any supposed benefits to be gained from televising judicial proceedings are, at best, dubious, as the Florida statistics so well illustrate.

Several of the questions posed in the Florida Supreme Court's survey were designed to measure the effect of television on the level of understanding of the Florida legal system. Of those responding, 35.9% of jurors and 36.9% of witnesses felt that their understanding of the courts was not at all aided by the presence of television.* Further, biographical data collected as a part of the sur-

* § 1, question 1.

vey indicated that, following their period of court service when cameras and other equipment were present, both witnesses and jurors showed a marked increase in unfavorable feelings about their court experiences.*

Moreover, it is highly questionable whether the random televising of trials, by what is essentially a commercial entertainment medium, is at all suited to educating the public in the realities of the law and the judicial process. The viewing public is daily saturated with programs about police officers, judges, lawyers and trials.** Yet these programs clearly foster an image of the legal system that is far removed from the real world. Gerbner, *Trial by television: Are we at the point of no return?*, 63 Judicature 416, 418-20 (1980). Rather than educating the public, it appears equally as probable that "[t]elevision will create popular spectacles of great appeal but deceptive authenticity as it selects and interprets trials to fit the existing pattern of law in the world of television." *Id.* at 420; *see Estes, supra*, 381 U.S. at 570-72 (Warren, C.J., concurring).

The argument that televising dramatic portions of some selected trials will be educational and will show the public what courts do is hardly persuasive to most experienced lawyers and judges. *See Lawpoll: Lawyers Aren't Convinced that TV Belongs in the Courtrooms*, 65 A.B.A.J.

* For jurors, the "favorable" and "very favorable" rating dropped from 90.5% to 77.9%, while the "unfavorable" and "very unfavorable" rating rose from 5.8% to 14.4%. Witnesses' feelings paralleled those of jurors, with "favorable" and "very favorable" ratings dropping from 85.4% to 66.5%, and "unfavorable" and "very unfavorable" ratings rising from 6% to 19.9%. Part IIA(3) (Survey Results—Biographical Information) of the Survey, at 25, 23.

** Gerbner, et al., *Cultural Indicators: Violence Profile No. 9*, 28 Journal of Communication 176 (1978).

1306 (1979). Nor are courts primarily educational institutions. "[T]he chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective." *Estes, supra,* 381 U.S. at 544. To divert them from this solemn purpose in the name of public education or better public relations is to tamper with our most precious rights for gains that are, at best, speculative. *See* Gerbner, *Trial by television: Are we at the point of no return?, supra.* Other, and far more appropriate, means of public education can easily be found.

Televising trials will not provide the public with the benefits its advocates claim, but it most certainly will cause grave harm to the proper functioning of the trial process and the rights of the criminally accused. The words of Mr. Justice Clark in *Sheppard* v. *Maxwell, supra,* 384 U.S. at 362-63, are particularly appropriate:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial interferences.

## Conclusion

**For the reasons stated, it is respectfully requested that the judgment be reversed and the case remanded for a new trial.**

Dated: June 4, 1980

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
*Appellants,*

*against*

THE STATE OF FLORIDA,
*Appellee.*

**On Appeal from the Supreme Court of Florida**

## Brief and Appendix of the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as Amici Curiae In Support Of Appellee

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IN THE

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THE STATE OF FLORIDA,
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**On Appeal from the Supreme Court of Florida**

**Brief of the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as Amici Curiae In Support Of Appellee**

## INTEREST OF AMICI CURIAE

The state attorneys general have a duty to protect the constitutional rights both of the public and of criminal defendants. The question whether electronic media coverage of judicial proceedings may continue implicates the public's constitutional right to attend

trials and a defendant's constitutional right to due process of law. Evaluation of the results of experiments with electronic media coverage has led the undersigned attorneys general to conclude that the public can exercise its right to attend court by means of watching televised reports of the proceedings without infringing a defendant's right to a fair trial. Therefore the Court is urged to permit state experimentation with electronic media coverage of judicial proceedings to continue.

## SUMMARY OF ARGUMENT

The limited holding of *Estes v. Texas* permits state experimentation with electronic media coverage of trials. Such experiments have yielded data, unavailable when *Estes* was decided, which demonstrate that television coverage of a judicial proceeding does not in itself deny a defendant a fair trial. Continuation of thoughtfully designed programs through which the states can test rules governing media coverage will result in standards which afford maximum protection of defendants' due process rights and of the public's right of access to trials.

The problems which the *Estes* court speculated might be created by electronic media coverage of trials have not developed. Most participants in televised trials do not report the psychological reactions to the televising process anticipated in *Estes*. This is due partly to improvements in technology which allow unobtrusive court coverage.

Jurors are no more likely to be prejudiced by pretrial publicity or by exposure to community comment and news reports concerning the trial in a case which is televised than in one which is not. The same measures which protect defendants in non-televised trials adequately protect defendants whose trials are

televised. A change of venue is available if pretrial publicity is inflammatory and the usual sanctions can be imposed if jurors disregard the court's instruction not to watch televised reports of the trial. The rules governing media coverage of trials can prohibit photographing the jury, ensuring that jurors will not be unusually visible to the public.

Jurors in televised trials have not reported substantial distraction due to awareness that the media was covering the trial. Most were too intent on the proceedings to think about news coverage and even those reporting some awareness of the coverage stated that it did not interfere with their deliberations.

Provisions to protect witnesses who have a legitimate reason for not testifying in front of cameras, *e.g.*, crime victims and confidential informants, can be included in the rules governing media coverage. Most witnesses questioned indicated they were no more nervous testifying in front of a camera than they would have been testifying at a well-attended trial. There is scientific and experiential evidence which shows the camera may have a positive effect on some witnesses.

Judges need not be burdened with extra administrative duties in trials covered by the electronic media. Many potential problems can be eliminated by promulgating detailed statewide rules and most unique media related questions which arise in an individual trial can be handled by a media coordinator or by other court personnel.

Neither attorneys nor judges in televised trials have displayed any special tendency to play to the audience. Those who are normally flamboyant need no greater audience than the jury and courtroom spectators to inspire them and those who are not flamboyant are not transformed by the presence of cameras.

Media coverage can be handled in a way which does not harass the defendant. Camera operators and still photographers who are required to stay behind the rail cannot intrude unduly on the defendant. Coverage of conferences with counsel and of recesses can be prohibited.

Televised trials are not inherently unfair to defendants and a total ban on television coverage is not necessary to protect defendants' constitutional rights. Specific errors alleged to arise due to electronic media coverage can still be raised as the basis of a denial of due process claim. State experimentation with electronic media coverage of trials should be allowed to continue.

## ARGUMENT

### I. *Estes v. Texas* Did Not Preclude State Courts From Experimenting With Televised Trials.

During the last six years, the highest courts of many states have authorized photographing, televising, and radio broadcast of trials on an experimental basis. Successful experiments have led to the adoption of permanent rules permitting electronic media coverage of court proceedings in some states. This court's decision in *Estes v. Texas,* 381 U.S. 532 (1965), permitted the states to experiment with televised trials. Although Estes's conviction was reversed because the nature of the media coverage in his case denied him a fair trial, the court did not hold that all television coverage of trials would deny a defendant due process.

Four members of the *Estes* court would have held that televising a trial is in itself a denial of due process, 381 U.S. at 542, 544, 552 (Warren, C.J.,

concurring), but Justice Harlan, who voted with the plurality to reverse, did not go so far in his concurring opinion. Justice Harlan stated that the court's decision was limited to particularly notorious criminal trials and had no application to routine criminal proceedings. 381 US. at 587, 591. He declined to prevent the states from experimenting with televised trials. *Id.* at 587, 590. In his dissent, Justice Brennan underscored the point that *Estes* does not constitute a blanket prohibition against electronic media coverage of state criminal trials. *Id.* at 617.

The states did not begin experimenting with televised trials immediately after *Estes* was decided, but by the mid 1970's conditions favored experimentation. Television had become more widespread and more people relied on television for news than had in the early 1960's. Also, television technology had improved, making unobtrusive coverage feasible.

The experiments which have been conducted, and which will be discussed in this brief, show that television coverage does not in itself deny defendants a fair trial. Mistakes and abuses by the media could be prejudicial in some cases, but nothing indicates that those errors would be any more common than other trial errors which are raised on appeal. The possibility of error in isolated cases no more justifies banning television cameras from all trials than the possibility of prejudicial pretrial publicity justifies preventing newspapers from covering criminal cases.

This Court recently recognized that the public has a constitutional right to attend criminal trials. *Richmond Newpapers, Inc. v. Virginia,* — U.S. —, 27 Crim. L. Rep. 3261, 3268 (July 2, 1980). In the *Richmond Newspapers* case the Court repeatedly observed that most people now acquire information about court proceedings through the print and electronic media, not through attending court themselves. The media

operate, therefore, as surrogates for the public. *Id.* at 3266, 3267 n. 12, 3269 n. 2 (Brennan, J., concurring). Priority of entry and special seating are often provided for media representatives so they may report to the general public, thereby enhancing the community's comprehension of the law and of how the courts function. *Id.* at 3266, 3268 n. 18.

The media should not be prohibited from using television cameras as one means of assisting the public to exercise its constitutional right to attend criminal trials unless there is a demonstrable overriding interest, *see id.* at 3268, and there is no such interest in most cases. When *Estes* was decided there was virtually no information available on how televising a trial affected the participants, so the court was forced to speculate. But now that information has been obtained through televising numerous trials. Reports from the states show that televising a trial does not have a negative effect on trial participants and therefore does not prejudice the defendant. Since the mere presence of television does not deny a defendant a fair trial, he must make a specific claim of prejudice before his interest can override the public's right to attend his trial by means of the television coverage.

## II. State Experiments With Televised Trials Have Been Carefully Designed And Cautiously Conducted. The Results Demonstrate That Experimentation Should Continue.

The appellants have not alleged that any particular circumstances connected with the television coverage of their trial resulted in a denial of due process. They argue that it is impossible for any

televised trial to be a fair one. Because the experience of the various states does not support that conclusion, it would be inappropriate flatly to prohibit all television coverage now when there is a trend toward increased experimentation.

This Court has encouraged state experimentation in the past, *cf. Wolf v. People of the State of Colorado,* 338 U.S. 25 (1949), with *Mapp v. Ohio,* 367 U.S. 643 (1961); *Betts v. Brady,* 316 U.S. 455 (1942), with *Gideon v. Wainwright,* 372 U.S. 335 (1963). When *Estes* was decided, the highest court of almost all of the states had forbidden televising trials. 381 U.S. at 580-581. Still, Justice Harlan declined to say that it would be a denial of due process to televise any criminal trial because such a blanket prohibition "would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." *Id.* at 587.

If the Court does not find the currently available data sufficient to support a holding that televised trials do not in themselves deny defendants due process, it should focus only on Florida's rules governing electronic media coverage of trials and determine whether operation of those particular rules denied the appellants a fair trial. The rules vary among states, and all rules can be amended, so a correctable defect in Florida's rules does not require forbidding televised trials everywhere./[1]

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/[1]Florida, Montana, New Hampshire, and Wisconsin have permanently adopted rules which authorize televising criminal trials without the defendant's consent. The rules governing televised trials adopted by the supreme courts of Florida, Montana, and Wisconsin are set out in the appendix to this brief.

Iowa, Nevada, New Jersey, New Mexico, Ohio, and West Virginia have conducted or are conducting experiments during which trials may be televised without a defendant's consent.

(footnote 1 continued on next page.)

Experimentation with televised trials has proceeded in a cautious, responsible manner. In Florida, when the supreme court received a petition seeking a reexamination of the judicial canon forbidding television and still photography in the courtroom, *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 766 (Fla. 1979), its first steps were to obtain materials favoring and opposing the change and to watch a videotape of court proceedings made in another state. *Id.* After that preliminary study the court ordered an experiment in a single judicial circuit which was to consist of televising two trials, one civil and one criminal, according to the court's guidelines and with the participants' consent. *Id.* But although the experiment was extended to three other circuits, no trials were televised because consent was not given. *Id.* Only then, because it viewed the experiment as essential to a decision on the petition before it, did the court order a one-year experiment in televising trials without the participants' consent. *Id.*

At the end of the experimental period the court received and reviewed an "imposing" amount of material, including briefs, reports, resolutions, comments, and exhibits. *Id.* at 767. All parties, media representatives, judges, and members of the public who

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(footnote 1 continued.)

All other states which permit electronic media coverage of the trial courts require at least the consent of the defendant and some require the consent of all parties or all participants. A trial televised with the defendant's consent raises different fair trial questions than one televised without the defendant's consent.

/[2]See *e.g.*, Sholts, Report to the Supreme Court of Florida re: Conduct of Audio-Visual Trial Coverage (hereinafter cited as Sholts Report); Baker, Report to the Supreme Court of Florida re: Conduct of Audio Visual Trial Coverage (hereinafter cited as Baker Report). Copies of the Sholts and Baker Reports have been lodged with the clerk of this court.

(footnote 2 continued on next page.)

participated in the televised trials were asked to report their experiences to the court. *Id.* at 767./[2] A unit of the office of state courts administrator conducted a survey of non-judicial participants in the trials, *id.* at 768, and the Conference of Circuit Judges conducted a survey of its membership. *Id.* at 767. An independent study was done by a group of Florida academicians. *See,* Strawn, *et al.,* Report, In re Petition of Post-Newsweek Stations, Florida Inc., for Change in Code of Judicial Conduct (hereinafter cited as Strawn Report)*; Pryor, *et al.,* "The Florida Experiment: An Analysis of On-the-Scene Responses to Cameras in the Courtroom," 45 So. Speech Comm. J. 12 (1979); Buchanan, *et al.,* "The Florida Experiment," 15 Trial 34 (April 1979). The court received briefs on the petition from twelve intervenors and amici curiae. *Petition of Post-Newsweek,* above, at 765.

During the term of the experiment there was variation in the administration of the rules among Florida's twenty judicial circuits. Whisenand, "Florida's Experience with Cameras in the Courtroom," 64 ABAJ 1860, 1862 (1978). Thus, the Supreme Court had the benefit of experiments within the experiment to guide it in deciding on the petition.

The court made adjustments based on the pilot program. The guidelines under which the experiment was conducted did not include a standard for the judge to apply in determining whether to prohibit photographing certain witnesses. *Petition of Post-Newsweek,* above, at 783. The need for such a standard became clear during the experimental period, *id.* at 778, and the court promulgated one in its decision amending the canon. *Id.* at 779.

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(footnote 2 continued.)

Several reports cited in this brief are not generally available and, therefore, copies have been lodged with the clerk. The first citation in this brief to each such report will be followed by an asterisk.

Florida took a cautious approach to amendment of the canon which barred cameras from the courts. The supreme court made changes in the smallest possible steps and an exhaustive study was made of all that had occurred during the experiment. The Florida experiment is an example of optimal use of the state as a laboratory.

Other states conducting pilot programs have also controlled them carefully and have made critical studies of the results. In Wisconsin the supreme court first received a petition for change of the rule against televising trials in 1970. Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom 6 (April 1, 1979) (hereinafter cited as Wisconsin Report).* The court appointed a committee which reported to it on the feasibility of the change, *id.* at Appendix F, and the court ultimately voted to retain the rule. *Id.* at 6. Seven years later the question arose again and the supreme court voted to suspend the rule for one year to permit televising trials on an experimental basis. *Id.* at 1.

A committee comprised of judges, attorneys, professors, and lay persons was appointed to monitor and evaluate the experiment. *Id.* The committee sought reports on the project from various sources. It employed law and graduate students as trial observers, *id.* at 2, and wrote to all of Wisconsin's trial court judges requesting their reactions to any televised proceedings over which they had presided. *Id.* at 53. About one-third of the judges responded. *Id.* Other participants in the trials were interviewed. *Id.* at 6-48 and Appendix I. The results of the interviews and a discussion of controlling law were submitted to the supreme court with the committee's unanimous recommendation that still photography, radio broadcasting, and television cameras be permitted in Wisconsin's courts. *Id.* at 56-57.

The committee also made recommendations for changes in the rules under which the experimental televising was conducted. *Id.* at 61-74. Like the Florida court, the committee saw a need to clarify the standards for applying the rule which allowed the judge to prohibit photographing individual participants. During the experimental period various groups had contacted the court about the rule: women's groups asked that photographing of rape victims be prohibited; a coalition of the elderly asked that elderly crime victims be entitled to veto coverage of their testimony; and the need for confidentiality of undercover agents and relocated witnesses was pointed out. Hoyt, "Prohibiting Courtroom Photography: It's Up To the Judge in Florida and Wisconsin," 63 Judicature 291, 294 (1980). The committee considered the requests which were made by letter or presented at a public hearing, *id.*, and reached a compromise. The suggested rule, which the court adopted, accords a presumption of validity to the requests not to be photographed of people in certain categories, including crime victims, juveniles and police informants. Wisconsin Report, above, at 70; Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, 11 (b), In re Code of Judicial Ethics, 90 Wis. 2d xix, xxii (1979) (hereinafter cited as Wisconsin Rules)./[3] The process by which Wisconsin's rule on excusing witnesses from being photographed was adjusted shows the value of experimentation and demonstrates that experiments are being undertaken in good faith with the goal of protecting all the interest involved. The process was open to suggestions and criticisms from everyone who was concerned and the committee and court acted on the suggestions they received.

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/[3]The Wisconsin Rules are included in the appendix to this brief. The appendix will be cited in the brief as AB. *See* AB 16.

None of the states has rushed to allow televised trials in disregard of a defendant's due process rights. In New York, cameras were first permitted in the appellate court for only one day. When the response was uniformly favorable, the Chief Judge appointed a media advisory committee to study the issue and make recommendations on broadcasting or telecasting from courtrooms. Interim Report to the Chief Judge of the New York State Court of Appeals by the Media Advisory Committee 2 (May 30, 1980) (hereinafter cited as New York Report).* After soliciting the views of all interested groups and individuals, *id.* at 3, and studying the voluminous response, *id.* at 4, the committee recommended permitting broadcast of appellate proceedings on a permanent basis, since an experiment had already been conducted, and recommended authorizing experimental coverage in trial courts. *Id.* at 5.

In Washington, the first experimental step, taken in 1974, was to film and tape a single trial. Washington Bench-Bar-Press Committee, Report Of The Subcommittee on Canon 35 (April 5, 1975) 35 (hereinafter cited as Washington B-B-P Report).* The film and tape were made to permit observation of the actual operation of equipment, but they were never telecast. *Id.* at 33. Witnesses and jurors were interviewed and reports from other participants were solicited. *Id.* at 4, 5. The experiment was successful and the committee proposed that the court permit televising trials on a permanent basis. *Id.* at 32. Two years later, in 1976, the supreme court authorized televising during court sessions. Washington State Superior Court Judges' Association Committee on Courts and Community, "Cameras in the Courtroom — A Two-Year Review in the State of Washington" 1 (Septemeber 11, 1978) (hereinafter cited as Washington Report).* A committee of the Superior Court Judges'

Association did a study in 1978 and concluded that the data available supported continuing to permit televised trials. *Id.* at 7. The committee also stated its intention to continue monitoring the media acitivity and to make reports to the judges. In Washington the experiment is ongoing and early success has not diminished the care with which the courts approach televising trials.

Twenty-five years ago when the Colorado Supreme Court questioned whether cameras should continue to be banned from court, its referee heard six days of testimony, complete with demonstrations of equipment, and then made a report to the court which resulted in the court's permitting televised trials. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics,* 296 P.2d 465 (1956). Courts have become even more careful in making that decision. Although each state which considers the issue profits from the experience of those which have already done so, none has adopted a rule based strictly on the experience of others without looking into the matter further. In New York, for example, the Media Advisory Committee recommended that consent of the parties to televise not be required during the experimental period since the experience of other states was that consent was difficult to obtain. New York Report, above, at 12. But the committee believed that it was essential that the state courts conduct their own experiment to determine the impact of television upon court proceedings in New York. *Id.* at 9. The process by which the states learn from each other, yet conduct independent experiments and introduce unique innovations, should be allowed to continue.

Whether televising trials is constitutional does not depend upon whether it is popular. But there is evidence that many who are initially negative about

permitting cameras into court change their minds after participating in a televised trial. One Florida study found that judges who had presided over one or more televised trials were more favorably disposed to the idea than those who had not. Strawn Report, above, at 51. The same was true for attorneys who had participated in televised trials as compared to those who had not. *Id.* at 60. An Illinois judge who travelled to Florida with a delegation from the Illinois State Bar Association to observe televised trials commented that members of the delegation were skeptical whether a fair televised trial was possible, but what they saw in Florida changed their opinions. Aspen, "Cameras in the Courtroom: The Florida Experiment," 67 Ill. Bar J. 82, 85 (1978). Televised trials should not be banned at this early juncture when relatively few people have actually participated in one. Negative opinion which is based only on speculation should not be permitted to outweigh the positive experience reported by many states.

## III. Improvements In Technology Which Make The Electronic Media Unobtrusive In The Courtroom Have Minimized The Possibility Of Trial Participants Reacting Negatively To Television Coverage.

The *Estes* court identified problems with televised trials which were unrelated to the obtrusiveness of the equipment used, but the relatively undeveloped state of the art in 1962 played an important part in the Court's decision. Former Chief Justice Warren's concurring opinion, in which two justices joined, emphasized the

disorderly scene created by the media representatives and equipment at a pretrial hearing. 381 U.S. at 552-554. Although the media presence at *Estes's* trial was less obstrusive, the pretrial conditions influenced the court's decision. *Id.* at 567. The Court also expressed the fear that the sponsorship demands of commercial television would lead to only the most sensational trials being televised. *Id.* at 545.

The Court observed that when advances in television technology occurred a different due process question would be presented. *Id.* at 540. In his concurring opinion, Justice Harlan noted the day might come when television was such a widely accepted part of everyday life that there would be no reasonable possibility that the judicial process would be disparaged by televising trials. *Id.* at 595. Then the due process issue presented by permitting cameras in courtrooms would have to be reexamined. *Id.* at 595-596. The question is now ripe for reexamination because great technological advances have been made and television is a much more common part of most people's daily lives than it was in 1962, when Estes was tried.

One of the justices of the Florida Supreme Court has explained that post-*Estes* advancement in electronic and photographic technology was a primary factor in that court's decision to permit cameras in court on an experimental basis. Boyd, "Cameras in Court: *Estes v. Texas* and Florida's One Year Pilot Program," 32 U. Miami L. Rev. 815, 820 (1978) (hereinafter cited as Boyd). The reports on televised trials which the Florida court reviewed at the end of the experiment showed that physical disturbance from the equipment had been minimized so that it was not even arguably a factor which would militate against continuing to permit televised trials. *Petition of Post-Newsweek Stations,* above, at 775. The presiding judge

at one trial televised during Florida's experiment confirmed that television equipment no longer creates a theatrical appearance in the courtroom. Sholts Report, above, at 14-15. The television camera was compact and unobtrusive, no Kleig lights were used, and the television cables were hidden. *Id.* at 15. After a televised trial in Wisconsin an observer commented that the cameras were very inconspicuous because the red "on the air" lights were disconnected and the operators minimized camera movement. Wisconsin Report, above, at 35.

There is general agreement among commentators that the day anticipated by the *Estes* court has arrived: television technology has advanced and television has become common-place. *See, e.g.,* Comment, "T.V. or Not T.V.: Televised and Photographic Coverage of Trials," 29 Mercer L. Rev. 1119, 1129 (1978); Note, "Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation," 9 Loyola U. of Chi. L.J. 910, 925 (1978). The appellants acknowledge that technological improvements have made camera operations less obtrusive. Appellants' Brief at 38.

Other developments in television have undercut the *Estes* court's concern that the economic demands of commercial television would dictate that only notorious trials be televised. The advent of public television and community access cable television provides alternatives where programming schedules are not determined by commercial considerations. At least one Florida criminal trial was broadcast gavel to gavel by the Public Broadcasting System. Sholts Report, above, at 5.

All types of stations have shown that their interest in covering court proceedings is not limited to sensational criminal trials. During a two year ex-

perimental period in Washington, television and still cameras were permitted in courtrooms. Criminal trials attracted the media, but so did sentencings, arraignments, legal arguments in a pornography case, an action seeking an injunction, zoning disputes, a traffic appeal, and civil trials raising property damage claims. Washington Report, above, at 2. During Wisconsin's experimental period an appellate argument in a banking law case was televised, as was a trial court case involving annexation. Wisconsin Report, above, at 44 and 45. According to Fred Graham, C.B.S. News Law Correspondent, opening courtrooms to television will lead to expanded coverage of a variety of court proceedings even on commercial stations. Using artists' courtroom sketches to illustrate a story seems archaic, but when film clips and photographs are available more stories will be deemed newsworthy. Graham & Fretz, "Cameras in the Courtroom: A Dialogue," 64 ABAJ 545, 547 (1978).

A Nevada commercial station successfully met the challenge of editing a videotaped trial for later broadcast. The television director edited thirty-five hours of videotape to produce a five hour broadcast. The show did not focus only on the more exciting parts of the trial, but presented the trial as an observer in court would have seen it with boring segments balanced against the dramatic moments. Goldman & Larson, "News Camera in the Courtroom during *State v. Solorzano:* End to the *Estes* Mandate?", 10 Southwestern U.L. Rev. 2001, 2038 (1978) (hereinafter cited as Solorzano). The advertisements were placed at natural breaks in the proceedings. *Id.* at 2039.

Improvements in technology and the existence of stations with non-commercial programming do not settle the question whether trials may fairly be televised. In *Estes,* Former Chief Justice Warren emphasized that the problem with televised trials was

the participants' awareness of being televised, not the noise and appearance of the cameras. 381 U.S. at 570. But there is a link between the obtrusiveness of equipment and the participants' awareness of the process. Anyone is less likely to be distracted by a silent film camera and stationary still photographers than by a camera which makes a whirring sound and still photographers who are running around the room in search of better angles. So in considering the psychological impact of the televising process on trial participants, one should be aware that any of the reactions anticipated in *Estes* would at least be diminished today because there is less to which to react.

## IV. Jurors In Televised Trials Have Not Experienced The Problems Anticipated In *Estes*.

One of the main concerns of the *Estes* court was the impact which televising a trial might have upon the jury. The court saw a potential for problems in several different areas. Pretrial publicity in a notorious case might prejudice prospective jurors. 381 U.S. at 545. If the jury were not sequestered — at substantial cost to the community — jurors might watch televised portions of the trial in the evening and consequently place greater emphasis on the testimony which was deemed newsworthy. *Id.* Jurors might also feel pressured by the knowledge that others, having watched the trial on television and formed their own opinions on the defendant's guilt, might be critical if the jury did not reach the same conclusion. *Id.* The *Estes* court speculated that the fact that the trial was televised might subtly distract jurors even if television equipment were improved so its operation did not create an overt distraction. *Id.* Finally, if a second trial became necessary it might be difficult to draw a jury

because so many people would have seen parts of the first trial and formed an opinion as to the defendant's guilt. *Id.* at 546-547.

### *A. Prejudicial Effect Of Publicity On The Jury.*

Many of the potential problems which concerned the Court are not unique to televised trials. *See* Whisenand, "Cameras and Courtrooms: Fair Trial — Free Press Standards," 52 Fla. B.J. 456, 458 (1978); Hanscom, "Cameras in the Courtroom: A Challenge for California," 53 Cal. State B.J. 226, 227 (1978). It may be the notorious cases which are most likely to receive television coverage, but those cases will also be heavily covered in newspapers and magazines. Television news coverage in advance of the trial would involve the same sort of background information provided by the print media and would not necessarily entail televising pretrial proceedings. If a film clip from a preliminary hearing or a motion hearing were broadcast, there is no reason to assume it would influence prospective jurors more strongly than a newspaper account of the same hearing. The question of prejudicial pretrial publicity can arise in any trial, whether it is to be televised or not. If voir dire of the jury demonstrates an actual problem, the remedy of changing venue is available.

Venue could also be changed for a second trial if the panel from which a jury was to be drawn had been biased by viewing the first trial. But such widespread prejudice is not a realistic concern. Usually not more than forty percent of the television audience watches even the most popular shows, Boyd, above, at 824, and those who do watch do not necessarily form an opinion which is different or more definite than that they would have formed by reading the paper. Further, second trials which result from reversals on appeal

will generally occur years after the original proceeding and the memories of prospective jurors will have faded. There would be some lapse of time even when a new trial results from a mistrial declaration or from the trial court's postconviction order.

### *B. The Influence Of Television Coverage On An Unsequestered Jury.*

An unsequestered jury sitting in a televised trial is in no greater danger of being prejudiced by the comments of those in the community or by media reports than is a jury in an untelevised trial. The jury will be instructed not to discuss the case with anyone, not to read any newspaper stories about it, and not to watch television reports concerning the trial. The operating assumption is that juries follow the instructions they receive. There is no reason to believe jury members who avoid forbidden newspaper accounts and refuse to discuss the case with friends will feel an irresistible compulsion to watch televised accounts of the trial. This is a matter of personal integrity. When deciding whether to adopt a permanent rule permitting cameras in court, the Florida Supreme Court declined to assume that jurors were unable or unwilling to abide by their oaths and the court's directions, saying that to make the assumption would "impeach the foundation of our system of justice." *Petition of Post-Newsweek*, above, at 777.

If individual jurors violate any of the court's instructions and are found to have been prejudiced they can be replaced by alternates or a mistrial can be

declared. This would happen in televised trials no more often than in those which are not televised./[4]

### *C. Community Pressure On Jurors.*

The *Estes* court feared that even jurors who were sequestered during trial might be influenced by community opinion. A juror who knew the community was hostile to a defendant might be afraid not to vote for conviction. 381 U.S. at 545. Again, this problem is not unique to televised trials. The community may also form a negative opinion before the trial of a case which is not televised.

Like mistrust of the unsequestered juror, this fear of influence is based on rejection of the assumptions which underlie the jury system. A potential juror who has formed an unshakeable opinion based on pretrial community opinion should be screened out in vior dire. Every member of the jury has promised to reach a verdict based exclusively on the evidence presented at trial.

Some critics of televised trials have speculated that jurors will be biased by their expectation of post-trial community reaction and that expectation alone may bias the jury regardless of whether the reaction ever occurs. When less than gavel to gavel coverage is provided the community will have a different basis for

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/[4]Precautionary measures are available for those who retain doubts about the jury. One Wisconsin court prevented cameras from filming anything which occurred outside the jurors' presence. *Wisconsin State Journal,* Section 3, p. 1, September 5, 1978 (Madison, Wisconsin). The media representatives covering a Washington trial imposed the same limitation on themselves. Solorzano, above, at 2050 n. 317. Thus even a juror who did watch a news report could not see evidence which was excluded from the trial.

forming an opinion than the jury does, but partial television coverage is no different in that regard than normal newspaper coverage which is necessarily incomplete. The jury will not feel pressure in a situation where there is partial coverage because if anyone were to disagree with the verdict the jurors could point out that the television audience was not exposed to all the evidence and did not hear the court's instructions. During one trial televised in Florida, the court requested the television announcer to caution the public periodically to remember they were not seeing the entire trial. Baker Report, above, at 16. If a trial is covered gavel to gavel, a jury would have no reason to anticipate that the public, having heard all the evidence and the court's instructions, would reach a different conclusion than the jury. So in neither situation would a jury have any reason to worry about whether the general public would agree with its verdict.

Jurors are likely to lose anonymity through means other than being televised, and televising a trial does not necessarily increase juror visibility. In a Wisconsin case recently televised gavel to gavel, the jurors' names, addresses, and occupations were prominently printed in the newspaper at the beginning and the end of the trial, *Capital Times,* Sec. 1, p. 1, June 19, 1980 (Madison, Wisconsin); *Wisconsin State Journal,* Sec. 1, p. 3, June 29, 1980 (Madison, Wisconsin), but the jurors did not appear on television because a Wisconsin Supreme Court rule prohibits photographing jurors./[5] In states where the trial court sets the conditions under which a trial may be televised, the court may order that jurors not be photographed. A Florida judge would have the authority to make such an order under Canon 3A(7) which permits electronic media and still

/[5]Wisconsin Rules, above, at xxii; AB 17.

photography coverage subject to the presiding judge's authority to prevent distractions and to ensure the fair administration of justice in the case. Florida Code of Judicial Conduct, Canon 3A(7).

During a fifteen month experiment when television and still photography were permitted in Wisconsin's trial courts, *see* Wisconsin Rules, above, at xix; AB 11, jurors in several cases were questioned about their experiences and their reactions to the cameras. In the first case only one juror commented that his wife received a number of calls from people who saw him on television, but they were not crank calls. Wisconsin Report at 26./[6] Four members of another jury were interviewed and all reported that they received no calls or letters during or after the trial from people who saw them on television. *Id.* at 30. None of the members of a third jury reported receiving calls or letters about the case from other people in the community. *Id.* at Appendix I. Thus practical experience refutes the claim that jurors who serve in a televised trial will be harassed. These jurors were not bothered even though the rules in effect did not prohibit photographing them. Under a rule or order which does impose that prohibition, community contact would be even less likely.

### *D. Distraction Due To Awareness That The Trial Is Being Televised.*

The most elusive concern expressed in *Estes* was that jurors would be distracted simply because the

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/[6]The rules in effect during the experimental period did not prohibit photographing the jury. *See* Wisconsin Report, above, at 2-4. At the end of the experimental period the study committee recommended changing the rules to prohibit photographing jurors. Wisconsin Report, above, at 70. This change was made. AB 17.

televising was occurring even if the equipment were not obtrusive. 381 U.S. at 546. The experience of jurors who have sat on televised cases since *Estes* does not bear out the distraction hypothesis.

It is not unusual for other participants in televised trials to report a belief that jurors were distracted by the televising process. In a study of Florida's year-long experiment with cameras in the courtroom conducted by four Florida academicians, more than half the attorneys questioned stated that cameras were a serious source of distracton to jurors. Strawn Report, above, at 60. But the number of jurors who reported being distracted was smaller — just over a third of the group interviewed. *Id.* at 36. Interviewees were simply asked to agree or disagree with a statement that the television cameras were a distraction. Pryor, *et al.*, "The Florida Experiment: An analysis of on-the-scene responses to cameras in the courtroom," 45 So. Speech Comm. J. 12, 17 (1979). Those conducting the study noted that the results did not indicate whether the distraction level was substantial enough to affect the trial outcome. *Id.* at 21. The authors of the report also warned that their study was too small to permit inferences to be drawn from the data. Strawn Report, above, at 36. They commented that the problem of distraction did not appear to be as serious as some critics supposed and recommended that the study of participants in televised trials continue. *Id.* at 52. In a separate study, ninety to ninety-five percent of the Florida judges reporting to the supreme court stated that the presence of electronic media did not affect jurors in performing their duty. *Petition of Post-Newsweek,* above, at 770.

More open-ended interviews with jurors who sat in televised trials in Wisconsin indicate that they were not distracted by the knowledge that the trial was being photographed. Awareness of the process does not

equate with distraction. Jurors from three trials were interviewed, but only one juror said that the equipment bothered her at first and she eventually became unaware of it. Wisconsin Report, above, Appendix I. Her initial awareness had no effect on the jury's deliberation. *Id.* While many jurors said they were aware that the televising process was going on they were not distracted by it and all reported that it had no effect on their deliberations. *Id.* at 26, 29, 30 and Appendix I. The typical comment was that the juror was too absorbed in the trial or too intent on hearing every word of testimony to think aobut the trial being televised. *Id.* at 26 and Appendix I.

Jurors who have participated in televised trials in other jurisdictions have reacted similarly. After a Nevada trial which was videotaped for later broadcast, the jury foreman observed that filming the trial did not detract from the fact-finding process. Solorzano, above, at 2040. There were no complaints from jurors during Colorado's first six years of televising trials. Hall, "Colorado's Six Years' Experience Without Judicial Canon 35," 48 ABAJ 1120, 1121 (1962). All of the jury members in a Louisiana trial which was partially televised reported neutral feelings about the televising process. They did not attach more importance to the case than they otherwise would have because it was covered by television. Humphries, Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom 2, 3.*

Some critics argue that, because jurors may not recognize the impact the cameras' presence has on them, studies which ask for jurors' reactions are meaningless. *See, e.g.,* Wisconsin Report, above, at Appendix G. But it is unreasonable to say that the speculation of others as to a juror's reaction is more credible and accurate than the juror's own honest description of his feelings and thought processes.

Judges and attorneys must bear in mind that jurors do not share their familiarity with trial procedures. When television cameras are first permitted in courtrooms, judges and attorneys may be aware of them as a novelty. But for most jurors, in court for the first time and charged with an enormous responsibility, the presence of television may be the most familiar and least interesting part of the trial. This is confirmed by a report of a Washington trial taped by television cameras. When the judge asked whether the jurors had been distracted by cameras, many indicated they did not realize it was unusual to have cameras in court. Washington Report, above, at 33.

Many of the concerns about television's impact on jurors expressed in *Estes* were not based on television's unique characteristics. In the unusual case where prejudicial pretrial publicity has occurred or where a juror disregards the instruction not to read or watch news reports there are remedies and sanctions available short of banning television from courtrooms. The special distracting quality of the televising process which was feared has not proved to be a reality. The experience to date suggests that careful experimentation should continue, not be forbidden.

## V. Any Unique Difficulties Which Witnesses In Televised Trials Might Experience Can Be Resolved By Incorporating Safeguards Into The Rules Governing Televised Proceedings.

In *Estes* the Court also expressed concern about the effect televising a trial might have on witnesses. 381 U.S. at 547. A variety of psychological reactions was envisaged, including fear, cockiness, and loss of

memory. *Id.* Witnesses might be harassed by strangers on the street, *id.*, and, like jurors, witnesses might not follow the court's instruction not to watch other witnesses and might then adjust their testimony so as to contradict or support that of other witnesses. *Id.*

Florida and other states which have authorized television coverage of trials have recognized that individual witnesses, as well as certain categories of witnesses, may have valid reasons for not having their testimony filmed. As a result not all witnesses will be required to testify before the camera.

In his concurring opinion in *Estes*, former Chief Justice Warren stated that requiring a witness to request that he or she not be photographed placed too great a burden on the witness, 381 U.S. at 568, although the basis for his conclusion was unclear since the trial judge in *Estes* had neglected to tell witnesses that they had that option. *Id.* While it would not seem to be an undue burden for most witnesses to request not to be filmed once they were advised that such a request was proper and regular, some states permit the court to order that a witness not be filmed even absent a request. In Florida, it is within the judge's discretion to exclude coverage of a witness:

> [U]pon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

*Petition of Post-Newsweek Stations*, above, at 779. Among the categories of witnesses who might properly be excluded in the court's discretion are participants in child custody proceedings, prisoners, confidential

informants and witnesses under protection of anonymity, victims of sexual battery, and relatives of victims. *Id.*

Wisconsin's more explicit rule permits a judge to prohibit recording or filming a witness for cause upon request or on the judge's own motion. Wisconsin Rules, above, Rule 11a, at xxii; AB 16. A request is attended by the presumption of validity in, among others, "cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary suppression hearings, divorce proceedings and cases involving trade secrets." *Id.*

These rules provide adequate protection for witnesses who, due to the nature of their involvement in the case or to their personalities, would have unusual problems if they had to testify on camera. Experience has shown that not all witnesses have such difficulties, so a total ban on filming trials is not necessary to ensure that a defendant's right to a fair trial is not jeopardized by frightened, forgetful witnesses.

Testifying before a television camera cannot fairly be contrasted with testifying when only judge, jury, counsel, and the defendant are present. Ordinarily a witness cannot escape testifying because he becomes nervous when confronted with a crowded courtroom. Some anxiety is a normal by-product of being questioned under oath when one knows the consequences of the testimony are serious. The anxiety may be increased by the presence of a crowd, but we accept that as a fair cost of the public's right to attend a trial. Thus, in order to be excused from testifying before the television camera, a witness must have a claim based on something more substantial than the nervousness with which every witness must cope.

There are indications that televising trials may have a positive effect on some witnesses. In a scientific study simulating courtroom conditions, participants viewed a film on an unfamiliar subject. They were then asked to answer questions about the film's content. Some subjects were questioned while a television camera was in full view, others knew a camera was operating but could not see it, and a third group was questioned without a camera present. All believed either that the film would be viewed by many people or, in the case of those in the third group, that their answers would be widely circulated. Hoyt, "Courtroom Coverage: The Effects of Being Televised," 21 Journal of Broadcasting, 487, 490-92 (1977). Those subjects who confronted the obtrusive camera included more correct information in their answers and gave more extensive answers to the questions than did those in the other two groups. *Id.* at 493. The researcher concluded that the study did not bear out the assumption that people's memories would fail due to fear or anxiety when they faced a television camera. *Id.* at 494. While the study conditions do not precisely duplicate those of a trial, the results support the conclusion that the majority of witnesses are not devastated when they face a camera.

The study results were corroborated in an experimental videotaped Nevada trial where the witnesses reported neither embarrassment nor intimidation. Solorzano, above, at 2040. Trial participants were intially aware of the camera, but responded positively. *Id.* The presence of the camera heightened the quality of contributions to the trial. *Id.* at 2041. Nor did the Florida judge who presided at the *Zamora* trial during Florida's experimental period observe any of the problems with witnesses anticipated in *Estes*. Baker Report, above, at 15.

While it might be difficult for an observer to detect whether a witness is frightened or intimidated, the observer can identify a cocky witness who is showing off for the cameras. Yet judges presiding at televised trials have not observed that phenomenon. Judges in Nevada, Colorado, and Texas have commented that witnesses did not "strut," "showboat," or "grandstand." Solorzano, above, at 2040; Comment, "T.V. or not T.V.: Televised and Photographic Coverage of Trials," 29 Mercer L. Rev. 1119, 1132 (1978); Note, "Constitutional Aspects of Television in the Courtroom," 35 U. Cincinnati L. Rev. 48, 66 (1966).

Witnesses who were interviewed following their participation in televised Wisconsin trials during the experimental period reported nothing more serious than a slight distraction due to the television cameras. One police detective who was accustomed to testifying commented that after he took the stand he did not realize the cameras were present. Wisconsin Report, above, at 21. He noted that he is always nervous about testifying, but the cameras did not make him more nervous or distract him. *Id.* The detective did feel more responsible for his testimony due to the trial being televised. *Id.* Two other witnesses from the same trial agreed that neither the television cameras nor the fact that the trial was televised distracted them, *id.* at 22-23, although one was bothered by the clicking of a still camera. *Id.* at 22. In another trial, the judge asked witnesses to be alert for any distractions caused by the cameras, but he received no complaints. *Id.* at 24.

In a third Wisconsin trial, four witnesses reported being somewhat distracted or mildly bothered. *Id.* at Appendix I. One of the four was motivated by his slight consciousness of the camera to avoid using slang expressions. *Id.* Four other witnesses who testified in the same trial did not notice the cameras or feel uncomfortable about their presence. *Id.* The

problems feared by the *Estes* court did not arise in the Wisconsin trials studied during the one year experiment.

The problem of witnesses failing to abide by a sequestration order is, again, not unique to televised trials although it would be easier for a witness to watch another witness on television than to approach the witness directly or to ask a third person about the testimony. But the witness who abuses the system by violating a court order is the exception. The decision whether trials may be televised should not be based on the premise that people normally disregard court orders. A witness who does disregard an order will be subject to the same sanctions as a witness who violates a sequestration order in a non-televised trial. The mechanics of notifying all witnesses of the order at the start of the trial should not present an overwhelming problem./[7]

Experience with televised trials shows that most witnesses are no more nervous about testifying in front of cameras than they would be about testifying at all. Rules which prohibit photographing those witnesses who have a substantial reason for not wanting their testimony televised have been and can be sanctioned. Such justified exceptions will protect a defendant's right to a fair trial.

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/[7]In one Wisconsin trial the court notified counsel that *voir dire* of any witness could be had outside the presence of the jury to determine whether the witness had watched others testifying on television. No requests for *voir dire* were made. Wisconsin Report, above, at 37.

In his report on the trial, the court recommended that all lay witnesses subpoenaed in a trial receive, upon request of counsel, a written order prohibiting their watching or listening to other witnesses. He suggested that witnesses who violated the order could be prevented from testifying. *Id.*

## VI. A Televised Trial Does Not Place An Administrative Burden On The Judge Which Diverts The Judge's Attention From Other Duties.

The *Estes* court was concerned that the task of managing the media would divert the judge's attention and energy from the primary responsibility of ensuring that the defendant receives a fair trial. 381 U.S. at 548. Although media presence does require some special planning and coordination, the entire burden does not have to fall on the trial judge. As televised trials become more common in a jurisdiction many of the procedures will become routine so that increasingly less attention to the media is necessary.

In many states, when the state supreme court permits televising trials on an experimental or permanent basis, the court also promulgates rules or guidelines which resolve questions that would otherwise fall to the trial judge to determine. *See,* Boyd, above, at 828. The Supreme Courts of both Florida and Wisconsin promulgated detailed standards covering equipment and personnel and their location, sound and light criteria, and coverage of courtroom conferences. *Petition of Post-Newsweek,* above, at 792-94; AB 1-6; Wisconsin Rules, above, at xx-xxii; AB 11-17./[8] The Florida court even specified by brand name and model the equipment which may be used. *Petition of Post-Newsweek,* above, at 794; AB 5-6. In Wisconsin, a media coordinator is designated for each judicial

/[8]Similar guidelines for televising court proceedings have been promulgated by the state supreme court in Tennessee, Notes following Canon 3(A)7, Code of Judicial Conduct (1979); *Oklahoma, Canon 3(A)(7)(f),* Code of Judicial Conduct; *Iowa, In the Matter of Media Coverage of the Courts,* Order entered November 21, 1979; and *Montana, In The Matter of Canon 35 of the Montana Canons of Judicial Ethics,* Order entered April 18, 1980, *see* AB 6-10.

administrative district./[9] The coordinator's duties are to work with the chief judge of the district and with the trial judge to implement the rules. Wisconsin Rules, above, Rule 2, at xx; AB 13. Disputes concerning the application of the rules are to be resolved as an administrative matter by the district's chief judge. Wisconsin Rules, Rule 10, above, at xxii; AB 16. In Georgia and Alabama, the supreme court must authorize the media plan for each courtroom before any proceedings are televised. Canon 3 (A8), Georgia Code of Judicial Conduct; Canon 3 (7A) (a), Alabama Canons of Judicial Ethics.

It is feasible to structure the general regulations covering courtroom filming in a way which eliminates many decisions on minor technical matters that the court would otherwise have to make in each case. The decisions which remain, such as whether to prohibit photographing particular witnesses for cause, are comparable to decisions on suppressing evidence which judges routinely handle and which are not unduly burdensome.

Judges who have presided at televised trials have not found that the additional responsibility interfered with their ability to control the trial and ensure its fairness. The judge who presided at the highly publicized *Zamora* trial in Florida made a detailed

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/[9]Media coordinators are also appointed in Iowa. *In the Matter of Media Coverage of the Courts, Rule 3(a),* (Order entered November 21, 1979). The Florida judge who presided at the *Zamora* trial, which received international press coverage, appointed a television station news manager to act as liaison between the court and the press. The court took this action on its own authority because there was an unusually large number of media representatives. Baker Report, above, at 3-4. The court was satisfied with the results. *Id.* The same procedure was successfully utilized in another Florida trial. Sholts Report, above, at 6.

report on the trial to the Florida Supreme Court. His report describes a trial which ran very smoothly and he makes no reference to feeling burdened by media management duties. Baker Report, above, at 8-18. The judge in another televised Florida trial remained opposed to televising criminal trials after the experiment but his opposition was based largely on anticipation of problems which might occur in other trials. Sholts Report, above, at 17. The judge acknowledged that televising the trial worked out much better than he believed possible, *id.* at 10, and he did not report being burdened by media related problems. A third Florida judge, who had presided at one televised trial and observed another, stated that he was in basic agreement with the anti-television sentiments expressed in the Sholts Report. Mounts, Report to the Supreme Court of Florida concerning audio visual trial coverage 1.* Yet he reported that the media representatives were cooperative and their behavior commendable. *Id.* Judge Mounts reported no management problems.

Two of the Wisconsin judges who presided at televised trials during the experimental period noted that the presence of the media increased their supervisory responsibilities and was somewhat burdensome, but not to an extent which interfered with performing their principal duties. Wisconsin Reprot, above, at 30 and Appendix I. But another judge who presided at a murder trial found the administrative responsibility no different than in any trial. *Id.* at 38. A fourth judge successfully delegated most of his supervisory duties to the bailiff. *Id.* at 11. The judge conferred with the media coordinator, but had only one media related problem to resolve in the course of a three day trial.

Many of the burdens on trial judges which the *Estes* court feared would result from televising trials

can be and have been avoided through the promulgation of detailed statewide guidelines governing the media. The experience of judges to date is that resolving the individual problems which arise does not interfere with their other responsibilities.

## VII. The Presence Of Cameras Has Not Provoked Inappropriate Conduct On The Part Of Judges And Attorneys.

The *Estes* court speculated that judges and attorneys might yield to the same temptation as some witnesses and play to the television audience. 381 U.S. at 548, 579. Elected judges and prosecutors might seek to create an impression which would ensure reelection, 381 U.S. at 548-49, while defense attorneys would direct their energy toward impressing prospective clients in the audience rather than representing the defendant to the best of their ability. *Id.* at 579. Experience in televised trials around the country has shown these concerns to be unfounded.

In a study of Florida attorneys, a majority of those who had participated in televised trials said their colleagues did not play to the television audience. Buchanan, *et al.*, "The Florida Experiment," 15 Trial 34, 35-36 (April 1979). Further, the attorneys believed that a strong judge could control the situation to prevent attorneys from behaving inappropiately. *Id.* Most of the trial judges questioned by the same researchers agreed that attorneys had not played to the cameras. Strawn Report, above, at 51. Another survey of Florida trial judges produced the same result. Whisenand, "Florida's Experience with Cameras in the Courtroom," 64 ABAJ 1860, 1864 (1978). One judge who prepared a detailed report on a televised trial commented that there were "no histrionics and no thespians." The attorneys were properly behaved. Sholts Report, above, at 10.

Some trial attorneys are unquestionably more flamboyant than others and the attorneys and judges who did report that attorneys played to the cameras may have encountered the flamboyant ones. But the surveys have not determined that these attorneys act differently before a television camera than they do before a live courtroom audience. If there is no difference, and the fact that most attorneys are not perceived to play to the wider television audience suggests there is not, the dramatic behavior cannot be attributed to television cameras. As the Colorado Supreme Court justice who recommended opening Colorado's courts to the cameras twenty-five years ago observed, "a lawyer who so demeans himself before a camera does not change his inherent characteristics for that particular occasion." *In Re Hearings Concerning Canon 35,* 296 P.2d 465 (Colo. 1956).

Reports from other states confirm the experience of Florida and Colorado. A Louisiana judge who presided at two televised trials stated that the attorneys did not "ham it up" because cameras were present. Humphries Report, above, at 4. His opinion was shared by judges reporting on televised trials in Washington and Texas. Solorzano, above, at 2048 n. 311; Note, "Constitutional Aspects of Television in the Courtroom," 35 U. Cincinnati L.Rev. 48, 66 (1966). One Wisconsin judge thought some attorneys might be theatrical, but said none were in his court. Wisconsin Report, above, at 25. Another commented that the attorneys appearing in a televised trial before him had better posture than usual, but the cameras had no other effect on them. *Id.* at 12.

Some observers believe that the presence of cameras has a notable positive effect on attorneys' conduct. One Wisconsin defense attorney remarked that the presence of cameras would deter incompetent attorneys whose performance could not stand up under

scrutiny. *Id.* at 16. In a videotaped Nevada trial, the participants all reacted positively to the camera in a way which was consistent with the defendant's right to a fair trial. Solorzano, above, at 2040.

The weight of the evidence shows that most attorneys do not react inappropriately to television cameras. If an attorney did react to the presence of television cameras in a way which jeopardized his client's interests, the client would have a remedy through appeal or other post-conviction relief. The attorney could also be subject to disciplinary proceedings. *See* Baker Report, above, at 17. Since remedies and sanctions are available to protect defendants against those attorneys who might react inappropriately, there is no reason to bar television cameras from courtrooms on the basis of attorneys' misbehavior.

There is less information available concerning judges' performances in televised trials than concerning attorneys' performances, but what is available indicates that judges, like attorneys, have not played to the television audience. The judges themselves report that the presence of cameras made no difference to them. Their behavior changed only in inconsequential ways: one said that he sat straighter and another that he chose his tie more carefully on days the cameras were in court. Wisconsin Report, above, at 12 and 24. Another judge observed that since trials are public and the judge's behavior is a matter of public record, there is nothing about a televised proceeding to make a judge act differently than usual. *Id.* at 39.

Attorneys who appeared in the trials over which these judges presided agreed with their self-assessments. Two defense attorneys who believed some judges might indulge in theatrical behavior conceded that the judges in their cases behaved well and

appeared unaffected. *Id.* at 14 and 31. Jurors and an official observer at another televised trial agreed that the judge was unaffected by the presence of the cameras. *Id.* at 29 and 30. One defense attorney even remarked that the presence of the cameras caused a judge to be more restrained than he had been on other occasions. *Id.* at Appendix I.

The Florida judge who received broad public exposure when he presided at the *Zamora* trial/[10] argues that televised trials give the public a valuable opportunity to observe elected officials. Baker Report, above, at 15. The *Estes* court feared that defendants' rights might be disregarded by posturing judges, but public scrutiny can lead instead to the removal of rude, indecisive, inattentive judges and of those who have not kept abreast of the law or are unable to control their emotions. *Id.* at 15-16.

Experience has revealed no general tendency on the part of attorneys and judges to put on a show simply because television cameras are present. The excesses of those whose normal style is to play to the courtroom audience cannot be blamed on television.

## VIII. Trials Can Be Televised Without Harassing The Defendant.

The *Estes* court was concerned that a defendant might be harassed psychologically by the presence of television cameras and therefore be unable to concentrate on the proceedings. 381 U.S. at 549. A defendant might also be unable to confer confidentially with counsel due to the cameras' intrusiveness and thereby be denied the effective assistance of counsel. *Id.*

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/[10]The judge estimated that the trial was viewed by several million people around the world. Baker Report, above, at 17.

There is less information available about defendants' reactions to televised trials than there is about the reactions of other participants. But while defendants have more at stake than other trial participants do, their reactions cannot be assumed to be totally different than those of the other participants. When jurors and witnesses report that they were not distracted by the presence of cameras or the fact that the trial was televised, and when jurors say they were too absorbed in the proceedings to think about the television cameras, it is fair to infer that the defendant would share those reactions.

That inference is supported by the fact that the arrangement of television equipment in most courtrooms makes it less apparent to the defendant than to jurors and witnesses. In Florida, the chief judge of each circuit designates where the equipment is to be placed in a courtroom. *Petition of Post-Newsweek,* above, at 793; AB 3. The equipment can be placed in such a position that only the back of the defendant's head is photographed. The Florida rules also prohibit still photographers from moving about to obtain photographs, *id.,* so defendants cannot be subjected to having photographers pop up on all sides of them.

Rules regarding placement of equipment which provide even greater protection thatn Florida's do can be devised. In Wisconsin, the rules governing media coverage not only authorize the trial judge to desigante where the equipment is placed, but require that the equipment be placed only in areas of the courtroom open to the public. Wisconsin Rules, Rule 5 (a), above, at xxi; AB 15. Under such a rule the cameras would have to be behind the rail and therefore behind the defendant.

Both Florida and Wisconsin rules prohibit audio pick-up or broadcast of attorney-client conferences.

*Petition of Post-Newsweek,* above, at 793-94; AB 4; Wisconsin Rules, above, at xxii; AB 15. The Wisconsin rules also prohibit operating audio or visual equipment during recesses. Wisconsin Rules, above, at xxii; AB 15. These regulations protect the defendant's right to confer confidentially with his attorney.

While abuses which would deny a defendant his right to a fair trial could occur in some cases, the defendant is not denied a fair trial simply because the trial is televised. In a Florida study of ninety-seven attorneys who had experience with televised trials, the respondents were almost evenly divided as to whether the presence of cameras unduly harassed the defendant. Buchanan, *et al.,* "The Florida Experiment," 15 Trial 34, 35 (1979). Thus, other participants in televised trials did not view the presence of cameras as inevitably unfair to the defendant. The only defendant interviewed during Wisconsin's experiment stated that he was not distracted by the media's presence and would not have preferred to testify without television cameras present. Wisconsin Report, above, at 20. In the widely covered *Zamora* trial, neither the defendant nor his attorney objected to or appeared to be concerned about the cameras' presence. Baker Report, above, at 16.

The defendant's interests in not being harassed and in being able to concentrate on the proceedings and confer effectively with his attorney are crucial aspects of a fair trial. There is not much data on defendant's reactions to televised trials available now, but what there is indicates that it is possible to regulate the media so that their presence does not weigh heavily on the defendant. Particular attention should be paid to this area of concern as study of televised trials continues.

## CONCLUSION

Reports from Florida and other states demonstrate that televising a trial does not have the adverse effects on trial participants anticipated in *Estes*. Televised trials do not inevitably deny defendants their due process rights. Unless specific prejudice is shown, a televised trial must be regarded as a fair trial. This case should be resolved in a manner which permits the states to continue experimenting with electronic media coverage of court proceedings.

Respectfully submitted,

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# APPENDIX

# FLORIDA RULES GOVERNING TELEVISION, RADIO, AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

## APPENDIX 3

## STANDARDS OF CONDUCT AND TECHNOLOGY GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

1. Equipment and personnel.

(a) Not more than one portable television camera [film camera — 16 mm sound on film (self blimped) or video tape electronic camera], operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Schedule A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment personnel.

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1. (c) above shall not be moved during the pendency of the proceeding.

4. Movement during proceedings.

News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjourn-

ment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

5. Courtroom light sources.

With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

6. Conferences of counsel.

To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

7. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such procedings.

8. Appellate review.

Review of an order excluding the electronic media from access to any proceeding, excluding coverage of a particular participant or upon any other matters arising under these standards shall be pursuant to Florida Rule of Appellate Procedure 9.100 (d).

# SCHEDULE A

FILM CAMERAS — 16mm Sound on Film (self blimped)

| | | |
|---|---|---|
| 1. CINEMA PRODUCTS | CP-16A-R | Sound Camera |
| 2. ARRIFLEX | 16mm-16BL Model | Sound Camera |
| 3. FREZZOLINI | 16mm (LW16) | Sound on Film Camera |
| 4. AURICON | "Cini-Voice" | Sound Camera |
| 5. AURICON | "Pro-600" | Sound Camera |
| 4. GENERAL CAMERA | SS III | Sound Camera |
| 7. ECLAIR | Model ACL | Sound Camera |
| 8. GENERAL CAMERA | DGX | Sound Camera |
| 9. WILCAM REFLEX | 16mm | Sound Camera |

VIDEO TAPE ELECTRONIC CAMERAS

| | |
|---|---|
| 1. Ikegami | HL-77 HL-33 HL-35 HL-34 HL-51 |
| 2. RCA | TK76 |
| 3. Sony | DXC—1600 Trinicon |
| 3a. ASACA | ACC-2006 |
| 4. Hitachi | SK 80 SK 90 |
| 5. Hitachi | FP-3030 |
| 6. Philips | LDK 25 |
| 7. Sony BVP 200 | ENG Camera |
| 8. Fernseh | Video Camera |
| 9. JVC 8800 u | ENG Camera |
| 10. AKAI | CVC-150 VTS-150 |
| 11. Panasonic | WV-3085 NV-3085 |
| 12. JVC | GC 4800u |

VIDEO TAPE RECORDERS/used with video cameras

| | | |
|---|---|---|
| 1. | Ikegami | 3800 |
| 2. | Sony | 3800 |
| 3. | Sony | BVU-100 |
| 4. | Ampex | Video Recorder |
| 5. | Panasonic | 1 inch Video Recorder |
| 6. | JVC | 4400 |
| 7. | Sony | 3800H |

*See, In Re Petition of Post-Newsweek Stations, Florida Inc.,* 370 So. 2d 764, 792-795 (Fla. 1979).

MONTANA RULES GOVERNING RADIO AND TELEVISION BROADCASTING AND STILL PHOTOGRAPHY IN COURT

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF CANON 35 OF THE MONTANA CANONS OF JUDICIAL ETHICS

ORDER

PER CURIAM:

By order dated February 3, 1978, this Court suspended the operation of Canon 35 of the Montana Canons of Judicial Ethics and superseded former Canon 35 by a revised Canon 35 effective April 1, 1978, for an experimental period of two years from and after April 1, 1978, or until sooner terminated or modified by order of this Court.

Since entry of that order recording and broadcasting by radio and television and taking of photographs in the courtroom have been permitted subject to the control of the presiding judge in any

proceeding. An informal questionnaire was sent to all District Judges concerning their experience with the operation of revised Canon 35 at the conclusion of one year of the experimental period of its operation. At the conclusion of the two year experimental period this Court reactiviated the Canon 35 Committee which held another meeting and canvassed the electronic and print media as well as the District Judges of this State concerning whether revised Canon 35 should be made permanent. Thereafter this Court canvassed the District Judges of this State to the same end. The Court has received the recommendation of the Canon 35 Committee that the revised Canon should be made permanent.

IT IS NOW ORDERED:

(1) Revised Canon 35 shall permanently supersede former Canon 35 permanently following the two year experimental period of its operation.

(2) A copy of revised Canon 35 is attached to this order.

(3) A copy of Revised Canon 35 shall be printed in the Montana Laywer and shall be contained in a future Volume of the Montana Reports.

(4) Revised Canon 35 shall take effect immediately.

DATED this 18th day of April, 1980.

CANON 35

The presiding judge in any court proceedings open to the public shall permit the recording and broadcasting by radio and television and the taking of photographs in the courtroom unless he is convinced from the particular circumstances of the individual case, or any portion thereof, that such recording,

broadcasting, or photography would substantially and materially interfere with the primary function of the court to resolve disputes fairly under the law.

In any case, or portion thereof, in which the presiding judge prohibits such recording, broadcasting, or photography, he must state his reasons for such prohibition in the record of such case.

No provision herein shall grant the media any greater access or rights than permitted by statute in those proceedings wherein public or media access or publication is prohibited, restricted or limited by law.

The provisions hereof shall apply to the Supreme Court of Montana and all other courts of the State of Montana over which the Supreme Court has supervisory control.

The following illustrative guidelines are presented as an aid to the judiciary and the media in implementing the provisions of this Canon:

ILLUSTRATIVE BROADCAST GUIDELINES

1. **Judge.** The judge has the authority to direct whether equipment may be taken within the courtroom. The broadcast news person should advise the judge prior to the start of a court session that he or she desires to electronically record and/or broadcast live from within the courtroom. The judge may issue instructions as to where the broadcast reporter and/or camera operator may position themselves. In the absence of any directions from the judge, the position should be behind the front row of spectator seats by the least used aisleway or other unobtrusive but viable location.

2. **Pooling.** The number of cameras in the courtroom shall be at the descretion [sic] of the presiding judge. Where coverage is by both radio and TV, the

microphone used by TV should also serve for radio, and radio should be permitted to feed from the TV sound system. Multiple radio feeds, if any, should be provided by a junction box. It should be the responsibility of each broadcast news representative present at the opening of each session of court to achieve an understanding with all other broadcast representatives as to who will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding should be reached outside the courtroom and without imposing on the judge or court personnel.

3. **Broadcast Equipment.** All running wires used should be securely taped to the floor. All broadcast equipment should be handled as inconspicuously and quietly as reasonably possible. Sufficient film and/or tape capacities should be provided to obviate film and/or tape changes except during court recess. No additional lights should be used without the specific approval of the presiding judge and then only as he may specifically approve as may be needed in the case of appellate hearings.

4. **Decorum.** Broadcast representatives' dress should not set them apart unduly from other trial spectators. Camera operators should not move tripod cameras except during court recesses. All broadcast equipment should be in place and ready to function no less than 15 minutes before the beginning of each session of court.

## ILLUSTRATIVE PRINT MEDIA GUIDELINES

1. **Judge.** The judge has authority to decide whether photographs may be taken within the courtroom. The photographer should advise the judge, prior to the start of a court session, that he or she desires to take photographs. The judge may issue instructions as

to where the photographer may position himself or herself. In the absence of any directions from the judge, the photographer should remain behind the front row of spectator seats.

2. **Pooling.** Unless the judge allows otherwise, no more than one still picture photographer is to be taking pictures in the courtroom at any one time. It is the responsibility of each photographer present at the opening of each session of court to achieve an understanding with all other photographers present as to which will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding must be reached outside the courtroom and without imposing on the judge or court personnel.

3. **Equipment.** The photographer's dress and equipment should not set him or her apart unduly from other trial spectators. Cameras which operate without flash and with a minimum of noise should be utilized.

4. **Decorum.** The photographer's movement in and out of the courtroom and while taking pictures should not be obtrusive. He or she should not, for example, assume body positions inappropriate for spectators.

These illustrative guidelines are subject to modification by a majority of the judges of any court to meet local conditions in their area and within their jurisdiction. Any such modification shall be in writing and disseminated to the affected media by appropriate means. *See 5 Montana Lawyer* (May 1980) at 12-13.

# WISCONSIN RULES GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

## ORDER

The court on December 23, 1977, having ordered a suspension of Rule 14 of the Code of Judicial Ethics for a one-year period beginning April 1, 1978, and having adopted standards of conduct to govern the use of audio or visual equipment in Wisconsin courtrooms for that period, and having appointed a committee to monitor and evaluate the use of audio and visual equipment in the courtroom and to file a report with the court of its findings and recommendations, and the experimental period having been extended by order of the court through June 30, 1979, and the committee having filed its report of findings and recommendations on March 30, 1979, and a public hearing having been held on June 12, 1979, on the report and recommendations, and appearances before the court and before the committee having been made by media representatives, trial attorneys, prosecutors, the office of the State Public Defender and members of the public,

On the basis of the experience during the fifteen-month experimental period and upon the recommendations of the committee,

IT IS ORDERED that Rule 14 of the Code of Judicial Ethics is hereby rescinded.

IT IS FURTHER ORDERED that the rules attached hereto are hereby adopted to govern electronic media and still photography coverage of judicial proceedings in Wisconsin effective July 1, 1979.

IT IS FURTHER ORDERED that the committee appointed by the court and consisting of the following members:

Professor David Fellman, Chairman
Attorney William Adler
Richard Bauer
Honorable William J. Duffy
Honorable William F. Eich
Edward Hinshaw
Professor James Hoyt
Nancy Mersereau
Attorney James Peter O'Neill
Anne Rossmeier
Honorable Michael T. Sullivan

is discharged with the graditude of the court for the intensive, thorough study of the matter which it conducted during the experimental period and for the excellent report which it filed for the court's information and consideration.

IT IS FURTHER ORDERED that a copy of this order shall be published in the official state newspaper and in the Wisconsin Bar Bulletin.

Dated at Madison, Wisconsin, this 21st day of June, 1979.

BY THE COURT:
*/s/ Marilyn L. Graves*
Marilyn L. Graves
Clerk of Supreme Court

# RULES GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

1. *Authority of Trial Judge*

(a) These rules of conduct do not limit or restrict the power, authority, or responsibility otherwise vested in the trial judge to control the conduct of proceedings before the judge. The authority of the trial judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by these rules.

(b) The term "trial judge" includes any judicial officer who conducts a public proceeding.

2. *Media Coordinator*

(a) The Wisconsin Freedom of Information Council shall designate for each administrative district a coordinator who shall work with the chief judge of the administrative district and the trial judge in a court proceeding in implementing these rules. Geographically large administrative districts shall be subdivided by agreement between the Council and the chief judge, with a coordinator designated for each subdistrict.

(b) Where possible, the trial judge shall be given at least three days' notice of the intention of the media to bring cameras or recording equipment into the courtroom. In the discretion of the trial judge, this notice rule may be waived where cause for such waiver is demonstrated.

3. *Equipment and Personnel*

(a) Except as otherwise provided in (b), three television cameras, each operated by one person, and three still photographers, each not using more than two cameras, are authorized in any court proceeding. Priority consideration will be extended to one of the three cameras to televise an entire proceeding from beginning to end.

(b) The trial judge may authorize additional cameras or persons at the request of the media coordinator or may limit the number of cameras where circumstances permit such increase or require such limitation.

(c) One audio system for radio broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes must be made through any existing audio system in the court facility, when practical. If no suitable audio system exists in the court facility, microphones and related wiring must be as unobtrusive as possible.

(d) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by these rules in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude all audio or visual equipment from the proceeding.

4. *Sound and Light Criteria*

Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices must not be used in connection with any

audio or visual equipment. Only equipment approved by the trial judge in advance of the court proceeding may be used during the proceeding.

5. *Location of Equipment and Personnel*

(a) The trial judge shall designate the location in the courtroom for the camera equipment and operators. The trial judge shall restrict camera equipment and operators to areas open to the public, but the camera equipment and operators must not block the view of persons seated in the public area of the courtroom.

(b) Camera operators shall occupy only the area authorized by the trial judge and shall not move about the courtroom for picture taking purposes during the court proceeding. Equipment authorized by these rules may not be moved during the proceeding.

6. *Courtroom Light Sources*

Modifications in the lighting of a court facility may be made only with the approval of the trial judge. Approval of other authorities may also be required.

7. *Conferences*

Audio pickup, broadcast, or recording of a conference in a court facility between an attorney and client, co-counsel, or attorneys and the trial judge held at the bench is not permitted.

8. *Recesses*

Audio or visual equipment authorized by these rules must not be operated during a recess in a court proceeding.

9. *Official Court Record*

Notwithstanding any film, videotape, photography or audio reproduction made in a court proceeding as a result of these rules, the official court record of the proceeding is the transcript of the original notes of the court reporter made in open court or pursuant to an order of the court.

10. *Resolution of Disputes*

A dispute as to the application of these rules in a court proceeding may be referred only to the chief judge of the administrative district for resolution as an administrative matter. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by these rules any order or ruling of a trial judge or chief judge under these rules.

11. *Prohibition of Photographing at Request of Participant*

(a) A trial judge may for cause prohibit the audio recording and the photographing of a participant with a film, videotape or still camera on the judge's own motion or on the request of a participant in a court proceeding. In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary suppression hearings, divorce proceedings and cases involving trade secrets, a presumption of validity attends the requests; the trial judge shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the presumption is not exclusive; the judge may in his or her discretion find cause in comparable situations.

(b) Individual jurors shall not be photographed, except in instances in which a juror or jurors consent. In courtrooms where photography is impossible without including the jury as part of the unavoidable background, such is permitted, but close-ups which clearly identify individual jurors are prohibited. Trial judges shall enforce this rule for the purpose of providing maximum protection for jury anonymity.

12. *Inapplicability to Individuals; Use of Material for Advertising Prohibited.*

The privileges granted by these rules to photograph, televise and record court proceedings may be exercised only by persons or organizations which are part of the news media. Film, videotape, photography and audio reproductions may not be used for unrelated advertising purposes.

*See* Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, In re Code of Judicial Ethics, 90 Wis. 2d xix (1979).

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IN THE

# Supreme Court of the United States

October Term, 1979
No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,

*Appellants,*

*vs.*

STATE OF FLORIDA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

**Brief of the**
**California State Public Defenders Association,**
**California Attorneys for Criminal Justice,**
**Office of the California State Public Defender,**
**Los Angeles County Public Defenders Association,**
**Los Angeles Criminal Courts Bar Association,**
**Office of the Los Angeles County Public Defender,**
**As Amicus Curiae in Support of Appellants.**

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IN THE

# Supreme Court of the United States

October Term, 1979
No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,

*Appellants,*

*vs.*

STATE OF FLORIDA,

*Appellee.*

## AMICUS CURIAE BRIEF.

### Statement of Interest of Amicus Curiae.

The California State Public Defenders Association is an organization composed of approximately 2,000 public defenders in various offices throughout the state and other criminal attorneys.

California Attorneys for Criminal Justice is the statewide association of criminal defense attorneys numbering approximately 1,200.

The Office of the State Public Defender is an agency of California State Government which is charged with the representation on appeal of indigent criminal defendants.

The Los Angeles County Public Defenders Association is an organization composed of approximately 400 public defenders.

The Los Angeles Criminal Courts Bar Association has approximately 600 members.

The Office of the Los Angeles County Public Defender represents indigent criminal defendants.

The filing of this brief reflects the concern of *amicus* that criminal defendants in California will have to suffer denial of due process if this Court approves the unrestricted use of television cameras in the courtroom. Experiments similar to those in Florida have been proposed in California.

*Amicus* has requested and obtained the written consent of all parties to file this brief.

**Summary of the Argument.**

Appellants in this action contend that televising their trial over their objections is a violation of due process.

*Amicus* will argue in this brief that:

1. Televising defendants over their objections is itself a denial of due process.
2. Television in the courtroom will adversely affect the other trial participants, thus denying a defendant a fair trial.
3. Proponents of televised courtroom proceedings must bear the burden of proof that television does not have an adverse impact on trial participants and will not deny a defendant due process.

## ARGUMENT.

### I.

### CALIFORNIA CRIMINAL DEFENSE ATTORNEYS OPPOSE CAMERAS IN COURTS WITHOUT DEFENDANT'S CONSENT.

Why do the Criminal Defense Attorneys in the State of California oppose the televising of trials over the objection of the defendant? Shouldn't the attorneys desire to appear on television? After all, we all know that criminal defense attorneys are a flamboyant bunch who love to be in the limelight. Many seek out and enjoy publicity. Or has this bunch of attorneys changed its stripes? Perish the thought! The criminal defense bar, with few exceptions, is still composed of the same publicity-loving, flamboyant, egomaniacs it has always had.

Why, then, would they reject the opportunity for instant fame? Why reject all the wonderful publicity? Maybe, despite the personality flaws inherent within the profession, the interest of the client still comes first. As a matter of fact, it is precisely that interest that compels the Criminal Defense Attorneys in California to submit this brief.

Experiments similar to those in Florida have been proposed in California and have been modified only because of Certiorari being granted in the *Chandler* case.

What is it that the Criminal Defense Attorneys fear? They fear the exposure on television will act as a form of punishment of their clients, without consideration of guilt or innocence. They fear that their clients will be permanently stigmatized as much as if they were branded.

The defense attorneys fear the impact of television on the trial participants. They are aware that they themselves may change their behavior as a result of appearing on television. Barish, *The Television Siren Sings to the Courts,* 5 Criminal

Defense 5, 6 at n.6 (July-August 1978) (hereinafter *The Television Siren*). They know that such changes will not be for the benefit of the client, but for the image of the attorney. They know that they will yield under the pressure of public exposure. After all, criminal defense attorneys are subject to the same human foibles as the rest of humanity.

California's criminal defense attorneys, cognizant of their own weaknesses as human beings, are aware those same weaknesses exist in others. They know that all who appear on televised proceedings will be influenced by the existence of cameras. They are concerned because witnesses, prosecutors, judges and jurors are also subject to the pressures of public exposure.

The California criminal defense attorneys believe that the system works best for their clients and for society as a whole, when the system is as free as possible from outside influences. When outside influences affect the participants, then due process of law suffers.

We believe that televising court proceedings is unfair to and denies the accused due process of law. Those same lawyers further believe that televising the proceedings denies others in the system fair treatment, and is detrimental to the system of justice.

> The great show trials and public confessions of the twentieth century occurred under dictatorships and during periods of witchhunt in democracies. They were part of the entertainment mainstream, now joined by much of what we call news, compelling attention, exposing deviation, spreading fear, and cultivating conformity.
>
> The struggle to remove trials from the public arena parallelled the fight against secret proceedings and the Star Chamber. In fact, the two are sides of the same coin. Arbitrary power wants no public witness to its

> private deliberations but needs all the hoopla it can get to legitimize its actions.
>
> The integrity and independence of judicial proceedings serve to protect the accused from both arbitrary power and public prejudice. The purpose of open trials is to help assure observance of these protections, not to entertain or even to educate.

Gerbner, *Trial by Television; Are we at the point of no return?* 63 Judicature 417, 421 (April, 1980).

II.

**DISPLAYING THE ACCUSED FOR TELEVISION IS IN ITSELF A DENIAL OF DUE PROCESS.**

**A. The Accused Does Not Lose All Rights of Privacy When Charged With a Criminal Offense.**

> It is significant that most of the key participants in a jury trial, including jurors, witnesses and defendants (in criminal cases) are in the courtroom not because they have elected to be but because they have been required to attend and participate. This fact alone distinguishes a judicial proceeding from one involving legislative or executive proceedings.

*In re Petition of Post-Newsweek Station, Florida, Inc. For Change in Code of Judicial Conduct*, 370 So.2d 764 (1979) (hereinafter *Post-Newsweek*), (Report of the Florida Conference of Circuit Judges, at 1) [Available at the National Center for State Courts, Williamsburg, Virginia]. The Florida Conference of Circuit Judges saw the televising of proceedings as an invasion of privacy.

"The right to privacy of persons who have not otherwise lost that right should be preserved to witnesses and persons summoned to jury duty." *Id.* at 23.

Those supporting televised proceedings also saw a privacy interest involved. The following quote about televised

proceedings is by the chairman of a committee that recommended to the American Bar Association that it change its standards to permit televised proceedings (the ABA rejected the specific proposal).

> [The defendant] doesn't have a right to privacy once he makes himself an object of public interest by getting indicted and brought into court. His privacy is pretty well exhausted when he finds himself the object of that much attention.

*The Television Siren, supra,* at 7 (quoting Judge Alfred T. Goodwin of the Court of Appeals for the Ninth Circuit).

Concepts of privacy are not limited to solitary individuals in closed rooms. Privacy is seen as a right to avoid publicity and display. It is obvious that a person charged with a crime loses by necessity, some of his privacy. After all, the traditional trial process requires the accused to be present in the courtroom where others are also present.

The problem arises when a person is displayed to the community for reasons *not necessary* for the court process. The only rights the accused should lose are those *necessary* for the orderly conduct of the court proceedings. Any other loss of rights should only occur as a result of a proper sentencing procedure after a conviction. The presumption of innocence is imbedded in our system.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895); *see also Estelle v. Williams*, 425 U.S. 501 (1976), and *Taylor v. Kentucky*, 98 S.Ct. 1930 (1978).

While the accused, who is presumed innocent, sits through trial, there should be no loss of rights or privileges except those absolutely necessitated by the fact finding process.

**B. Publicly Displaying the Accused During Trial Is a Form of Punishment.**

Who has not seen in the news media pictures of persons arrested who are covering their faces to avoid the public condemnation that occurs by such exposure. THEY KNOW THE EFFECT OF SUCH EXPOSURE without the need for sophisticated studies.

Television personnel have noted that cameras in the hallways or on the courthouse steps always seem to catch a defendant "coming out and he's hiding his face. That might give the impression that he's guilty." Weisman, *TV Goes on Trial,* TV GUIDE 10 (January 14, 1978) (quoting Ralph Renic, vice-president and news director for WTVJ, Miami's CBS affiliate.) Are we to believe that television advocates are in fact trying to preserve the presumption of innocence by photographing the defendant in the courtroom, where he cannot hide his face?

Displaying the accused on television during the trial will act to permanently stain the reputation of the accused and forever cause that shame to be placed upon that individual's family! IF PERMITTED, THE TELEVISION CAMERA CAN BECOME A NEW PILLORY.

Even 30 years ago when our communications media was in its infancy compared to today, what was happening was clearly identifiable. Look at what was said in 1950.

> [M]odern conditions have magnified the power of congressional defamation to do harm and have made it impossible to dismiss lightly its consequences to individuals. A hundred years ago legislative voices

> carried but a short way beyond the walls of the capitol. Pillory by publicity today, is nationwide; a man cannot live down a bad name given to him in the national press by moving to another town.

Paul and Mandel, *A Remedy for Smear-by-Congress,* 122 New Republic 14 (February 27, 1950).

So the concept that publicity can act in the same manner as the old public humiliations is not a new idea. This power was recognized by the court in *Estes v. Texas,* 381 U.S. 532 (1965).

"The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. . . ." *Id.* at 549.

Even those who have been convicted retain some rights.

> [I]nmates in jails, prisons or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters however "educational" the process may be for others.

*Houchins v. KQED,* 98 S.Ct. 2588, 2592 at n.2 (1978).

Should the rights of those not convicted by any less?

**C. Pillory of the Accused Is a Major Form of Punishment.**

> Crimes produce a stain, which may be washed out by reformation, and which frequently wears away by time. But public punishments leave scars, which disfigure the whole character and hence persons who have suffered them are ever afterwards viewed with horror or aversion.

Benjamin Rush, *An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society* (Philadelphia, 1787), p. 14, as quoted in *American Law: The Formative Years* (Anno Press, N.Y., 1972).

The evils of the stain of such public display of individuals was apparent over 200 years ago. The display on television of an individual forced to sit at the counsel table is little different from the ancient process of placing a person in stocks. He is involuntarily placed in a position for public display, facing the humiliation of such exposure.

> [T]he majority will more likely resemble respondent drawn into a public forum largely against their will in order to obtain the only redress available to them or to defend themselves against actions brought by the state or others.

*Wolston v. Readers Digest Ass'n Inc.*, 99 S.Ct. 2701, 2708 (1979).

Those seeking to defend themselves against actions brought by the state will now find the burden of being publicly displayed placed on the exercise of that right.

**D. Public Humiliation Raises Due Process Issues.**

"[W]here the state attaches a badge of infamy to the citizen, due process comes into play." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).

The court in that case ruled that when a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, due process rules come into effect. To think that holding people and displaying them for the television cameras is any less onerous than posting a name in local bars is illusory.

The state cannot claim that they are merely conducting trials and the telecasting is something separate from them. It cannot participate and then claim no responsibility. The circumstances inevitably prove otherwise.

> The record fails to show whose idea it was to make the sound film, and broadcast it over the local television station, but we know from the conceded circumstances

> that the plan was carried out with the active cooperation and participation of the local law enforcement officers.

*Rideau v. State of Louisiana*, 373 U.S. 723, 725 (1963).

### E. The Courts May Not Abdicate to the Television Industry Responsibility for Protecting the Accused.

If there is to be public humiliation as a punishment, then it should only occur as a result of a legally imposed sentence after conviction. While the courts should not concern themselves with how the local news programs are presented, it is of concern when the courts place persons presumed innocent in a position to be humiliated and disgraced by the media. The courts must not abdicate their responsibility of ensuring that no one is punished without due process of law; nor should they turn that responsibility over to others.

Since television is not required to be permitted in the courts, it can come in only by invitation. If that invitation is extended, the responsibility for the effect of television on the accused will be on the courts, not the media.

> One of the dangers some judges and lawyers see in broadcasting trials is that 30 seconds of selected . . . material coming out of a 3 week trial will probably not present a very accurate picture of what's going on. But again that's a problem for the media to work out. It isn't a case where the legal profession has any interest in censorship.

*The Television Siren, supra*, at 9, n. 10 (Statement of Judge Alfred T. Goodwin).

That may be true during normal news coverage. However, when the state takes an individual and places him on public display, it is responsible for the consequences.

III.

**THE PRACTICE OF TELEVISING IN-COURT PROCEEDINGS HAS ADVERSE EFFECTS UPON A TRIAL AND ITS PARTICIPANTS.**

Headline:

TV CAMERAS BARRED AT CBS'S MEETING.

CBS Inc., which has been a leader in the efforts to gain admittance for television cameras to courtrooms and Congressional proceedings, last Wednesday barred television coverage of its own annual stockholders meeting in New Orleans. The company did permit newspaper reporters to attend.

In the past, CBS had allowed the meetings to be covered by accredited television-news organizations, and the network has subsequently decided to let accredited television-news camera units cover future meetings.

"We regard this as a private meeting open only to stockholders of the corporation." William S. Paley, chairman of CBS, said at the event. "As a matter of policy, we barred all television cameras from coming into our meeting, including our own."

Mr. Paley explained at the meeting that the presence of cameras had disrupted a previous meeting and that stockholders had complained.

• • • •

*New York Times,* Section C, p. 18, April 21, 1980.

**A. Television Interferes With the Purpose of a Fair Trial.**

In *Estes v. State of Texas,* 381 U.S. 532, 540 (1965), Mr. Justice Clark, for the Court, stated that "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." Television in no way contributes to this objective.

In fact, its impact interferes with the very purpose of a fair trial.

> Its use amounts to the injection of an irrelevant factor into court proceedings. In addition, experience teaches that there are numerous situations in which it might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge.

*Id.* at 544-545.

Controversies, both criminal and civil, are to be adjudicated "in the calmness and solemnity of the courtroom according to legal procedures." *Cox v. State of Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting). Bearing in mind that "fundamental conception" of what should constitute a fair trial, television's presence only detracts from that solemnity.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

*In re Murchison*, 349 U.S. 133, 136 (Black, J.) (1955).

It has been noted that "most judges who reject cameras in the courtroom do so on the philosophical grounds that 'Justice must satisfy the appearance of justice.' They believe that our system of law must prevent even the possibility of unfairness to a defendant." *In re Petition of Post-Newsweek Stations Florida, Inc., For Change in Code of Judicial Conduct*, 370 So.2d 764 (1979) (hereinafter *Post-Newsweek*) (Report of David V. Strawn, Raymond W. Buchanan, Milan D. Meske and Bert Pryor, at 52).

## B. Television Has Adverse Effects on Trial Participants.

### 1. Behavior of Participants Adversely Affected.

It has been said that "the adverse impact which television's presence has on the behavior of all the trial partici-

pants, from the jurors to the trial judge, impairs the defendant's ability to obtain a fair trial.''. Note: *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation*, 9 Loy. L. J. 910, 933-934 (1977-78) (Hereinafter Note: *Televised Trials*).

In fact, the main problem associated with televised trials is the harmful psychological effect on the trial participants which is caused by the presence of television in the courtroom. (*See* Note: *Televised Trials, supra*, 9 Loy. L. J. at 932).

**2. Effect on Jurors.**

The court in *Estes* believed that the potential psychological impact of television upon jurors was ''of the greatest significance'' because ''they are the nerve center of the fact-finding process.'' *Id.* at 545.

A juror thus plays a crucial role in a trial, and a fair trial depends upon the jurors' ability to remain free of external distractions and pressures.

Yet jurors surely are aware that there is a special notoriety to a televised trial, and that their actions will be judged by countless television viewers, none of whom will have had the benefit of the jury instructions which guide the jurors in their deliberations.

> Common sense tells us that jurors who are subjected to cameras in the courtroom would tend to feel that their performance will be judged by public sentiment.

*Post-Newsweek, supra* (Resolution of the Circuit Judges of the Fourth Judicial Circuit of the State of Florida on the Issue of Television and Other Cameras in the Courtroom, at 3) (hereinafter Resolution of Circuit Judges).

Courts have relied on experience and common sense in vocalizing their fears that televising jurors would add un-

warranted and harmful pressure to their burden of decision-making. Others agree.

> There can be no doubt that the judgment of jurors is greatly influenced by the presence of television cameras in the courtroom. In the first televised trial in Dade County, the jurors asked the trial judge if they could watch themselves on television during the evening recess . . . . Recently, one juror commented that the jury on which he sat withheld its decision because of the knowledge that the trial was being covered by television, and the jurors wanted to minimize the embarrassment that a speedy verdict would cause a member of the defendant's family.

I. J. Block, *Cameras and Courtrooms: the Denial of Due Process*, 52 Fla. B. J. 454 (June, 1978).

Psychological studies appear to support the proposition that the broadcast of notorious criminal trials, realistically the only ones which will be televised, would create such obvious public hostility that jurors would be pressured to convict. Psychological studies have been conducted which dealt with the effect of external influences on individual decision-making. These studies demonstrate that the ability to remain anonymous is a critical factor in allowing a person to adhere to his convictions and beliefs. [*See* Raven, *Social Influence on Opinions and the Communication of Related Content*, 58 J. Abnormal and Social Psychology 119 (1959); Deutsch and Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 J. Abnormal and Social Psychology 629 (1955).] In an article entitled *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity*, 24 J. Personality 339 (1956), authors Jane S. Mouton, Robert R. Blake and Joseph A. Olmstead arrived at the conclusion that "when the situation permits identification of the person whose be-

havior is different, susceptibility to conformance pressures is increased because the individual knows that he can be held personally accountable and required to explain his conduct.'' *Id.* Thus anonymity serves to shield the individual from external pressure, and allows him to freely make his decision. ''For any situation involving contradictory forces . . ., with individual reactions subject to criticism, the maintenance of independence in jurors should be increased by providing conditions of anonymity.'' *Id.* at 345.

External pressure to convict due to television's obvious denial of anonymity is not the only problem connected to television of jurors. The distraction caused by the knowledge that the ''all-seeing eye'' of the television camera is glaring at them can cause jurors to be distracted from the business at hand.

In jurisdictions where television has been allowed in the courtroom on an experimental basis, trial lawyers have confirmed judges' observation by reporting that they have seen jurors actually watching the television cameras rather than concentrating on the evidence. See Block, *Camera and Courtrooms: The Denial of Due Process, supra*, 52 Fla. B. J., n.5 at 454. Jurors themselves have commented:

> The average juror serves with some degree of apprehension and should be spared from unnecessary distraction, even if that distraction is only in the form of knowing that they are ''on camera'' at any time during the trial proceedings.

*ABA: Cameras in the Courtroom, A Presidential Showcase Program*, 133 (1979).

It is important to note that while the defense attorney has his back to the spectator section of the courtroom, jurors do not. The presence of cameras can act as an instant editorial comment about witnesses and testimony, depending upon who the camera is directed at, and when. Jurors can

not help but be influenced in weighing testimony by those controlling cameras. The defense attorney has no way of knowing what those with cameras are doing that can influence jurors.

**3. Effect on Witnesses.**

Television coverage of a witness has an impact upon him that is "simply incalculable." *Estes, supra*, 381 U.S. at 547.

Witnesses are very often quite reluctant to appear and testify even when trials are not televised. The prospect of occupying the "hot seat" and facing intense questioning from attorneys, and sometimes judges, is enough to make any witness nervous, hesitant, and reluctant to testify. Sitting under the gaze of lawyers, judges, and jurors is tough enough; but add to that the gaze of countless television viewers, and an intolerable situation results.

The converse is just as intolerable, however. The witness who "plays" to the television audience or "hams" it up may very well make a negative impression upon a jury, and thus jeopardize the trial. He won't be concentrating on simply telling the truth, which is his sworn duty.

Apprehensions about adverse effects of television coverage upon witnesses have been confirmed by states which have experimented with courtroom television. *ABA: Cameras in the Courtroom supra*, at 112 (Citing *A Sample Survey of the Attitude of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977, and June 30, 1978* (hereinafter *Florida Survey*), prepared by the Judicial Planning Coordination Unit of the State Courts Administrator.) Three-quarters of the attorneys who took part in the Florida experiment said that they believed that mi-

crophones and cameras had made witnesses self-conscious or nervous. *Florida Survey*, Part II (A) (i) (iii) at 1-2.

That same survey revealed that television's presence in the courtroom caused fifty-three percent of the witnesses to feel self-conscious and over forty-six percent of the witnesses to be at least slightly distracted. Overall, over thirty-six percent of the witnesses opposed television, photographic or radio coverage. *Florida Survey*, Part II (A) (1) (i) at 5-7, 9.

A Florida Assistant State Attorney personally experienced witness reluctance due to the courtroom cameras:

> A case in point was a prosecution against police officers. Two main witnesses were police informants. They greatly feared reprisals from "the street" when their faces appeared on TV as police informants. Names given in the electronic or printed media do not have the same impact since very few informants are known on the street by anything other than nicknames or first names.

*Florida Survey, supra*, Part II (A) (2) at 19.

Comments by other participants in the Florida experiment echo those of the Assistant State Attorney. One participant said, "I think cameras in the courtroom, still or movie, are an invasion of privacy and add confusion and another hassle witnesses and families [of victims] have to cope with [during] . . . a traumatic and trying time." *Id.* at 6-9. Another who had actually viewed the proceedings on television responded: "[Watching the trials on television, I saw] the agony of some of the witnesses. . . . Surely, their ordeal was bad enough without the added trauma of knowing that their testimony was being televised." *Id.*

In another case a witness was so aware of the presence of the camera that he asked to testify with his back to the camera. *Block, Camera and Courtroom: The Denial of Due*

*Process*, 52 Fla. B.J. 454, n. 5 In another trial, witnesses were admonished not to listen to other witnesses' testimony yet the court discovered that during the trial the witnesses were actually listening to or watching other's testimony on television or radio. *Id.*

An attorney involved in the Florida experiment stated that "a witness must testify on TV concerning matters he believes very unpopular . . ."; or when a witness gives testimony which "tends to contradict a fact testified [to] by a greater number of witnesses . . ." he realizes this inconsistency is being witnesses by a vast television audience and he is consequently made to feel that "the public will think he is lying because he stands alone." R. Buchanan, B. Pryor, M. Meeske, D. Strawn, *The Florida Experiment* 15 Trial 34, 35 (April, 1979).

A prosecutor commented that "some witnesses were reluctant to put themselves in a bad light. Several were afraid for their own safety or that of their families." *Id.*

Televising witnesses thus can only serve to exacerbate an already difficult situation. Reluctance to testify in front of but a relatively few people in a courtroom will be magnified by the knowledge that vast audiences will be viewing on television. Likewise, witnesses who tend to bask in the limelight will indulge themselves in the notoriety and attention which television will focus on them. The result on both cases is that witnesses' attention will be on the camera instead of on their duty of telling their story truthfully. The real loser in all of this will be the defendant, for his right to a fair trial will necessarily be infringed.

**4. Effect on Judges.**

The judge's task is to "make certain that the accused receives a fair trial. This most difficult task requires his undivided attention." *Estes*, 381 U.S. at 548. Having to

supervise the presence of television cameras adds an unwarranted and irrelevant burden to the judge's responsibilities. In addition, should he decide that televising the trial would be detrimental to the best interests of the defendant, the judge would also be faced with the task of justifying any exclusion. "Such added responsibilities would certainly deflect at least part of the judge's attention which should properly be directed to the case." Fatzer, *Cameras in the Courtroom: The Kansas Opposition,* 18 Washburn L.J. 230, 239 (1979).

Furthermore, many judges are elected and must face the prospect of re-election. Television exposure can make or break any candidate, and incumbent judges are in position to utilize the free exposure that cameras in the courtroom provide. It has been pointed out that "about 10 percent of the electorate can now identify any judicial candidate during an election. A TV trial can easily multiply that recognition factor for a candidate." Gerbner, *Trial by television: Are we at the point of no return?,* 63 Judicature 417, 426 (April, 1980).

It is imperative that the attention of the trial judge, like that of jurors and witnesses, be centered upon the trial. Television makes this almost impossible. The "search for the truth" which is the hallmark of a fair trial is, again, sidetracked.

**5. Effect on Lawyers.**

No less than the other trial participants, lawyers representing all parties involved are adversely affected by the presence of cameras in the courtroom. 45.6 percent of the attorneys involved in the Florida experiment reported "serious discomfort" due to the television cameras. Buchanan, *et al., The Florida Experiment* 15 Trial at 35. (April, 1979). One attorney commented that other "attorneys played to

the cameras so badly that even the press joked about it." *Id.* at 36. An attorney with over ten years of experience observed that "because of the presence of TV, everybody acted differently and emphasis may have been placed in the wrong place." *Id.* Overall, 59.6 percent of the responding attorneys said that Florida Courts should not continue to use television. *Id.*

Prosecuting attorneys were not immune to television's deleterious effects. A prosecutor in Nevada discussed his experience with televised court proceedings:

> To be quite candid, I would have to say that I was periodically conscious of the cameras and realized that we could not cut and reshoot. At the time, I felt the television aspect was one more problem or pressure that had to be overcome along with the marshaling of facts, presentation of evidence, and winning the case before the jury. I would have to conclude: that the presence of television or motion picture cameras during a jury trial has somewhat a negative effect on an attorney's performance.

*ABA: Cameras in the Courtroom, supra,* at 76-77.

Gilbert Rosenthal, a New York City attorney, got right to the point: "Remember trial lawyers are hams at heart. . . . [W]e all know lawyers who take a case and make a cause of it. Can you imagine the result, or lack of result for their clients, if this [radio and television coverage] is permitted." Fox, *Radio and TV in Courtroom Voted Down by State Bar,* 181 N.Y. Law J. 1 (January 29, 1979). The result, of course, is damage to the defendant and his right to a fair trial.

## IV.

## THE BURDEN IS ON THOSE WHO BRING TELEVISION INTO THE COURT TO DEMONSTRATE THAT TELEVISION HAS NO EFFECT.

### A. Pro-Television Advocates Have Attempted to Place the Burden on the Accused to Show Prejudice.

Those persons supporting the televising of court proceedings have cleverly tried to shift the burden to those opposed to television, trying to require that the opposition demonstrate conclusively the prejudice caused by the introduction of television. The obligation should be on those trying to bring extraneous objects into the courtroom to show that their actions will not affect the administration of justice.

Judge Francis T. Murphy, Presiding Justice of New York's Appellate Division, First Department, is of the view that television advocates bear the burden of proving that a fair trial will not be jeopardized by cameras in the courtroom:

> The issue raised by the pro-TV activities (sic) have been improperly framed, in my view. We are now asked to prove why a fair trial will not be had if the camera is allowed into the courtroom. Credit should be given to those who urge greater coverage for having shifted the burden so skillfully. I believe the burden is upon those who advocate televising judicial proceedings to clearly demonstrate that the constitutional guarantee of a fair trial will still be attained. That guarantee is solely for the accused (*Estes*).

Murphy, *Trend to Televised Court Proceedings*, 181 N.Y. Law Journal 25 (Jan. 1979).

Using the balancing test for due process analysis can be enlightening.

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute, procedural safeguards: and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

The first interest is apparent; the accused may be denied a fair trial, and further may be publicly humiliated as a result of the actions of the state.

The second risk is the high probability of an unfair trial, and the certainty of public humiliation. Substitute procedural safeguards (not permitting cameras over the objection of the defendant) solves the problem.

Finally, the government has no interest in bringing cameras into the courts, although some politicians may see a temporary public relations benefit with the media by bringing the cameras in. It should be noted that the interest of the government is not necessarily the same as that of the politicians. The fiscal and administrative burdens are clearly less when the cameras are not in the courts.

And while engaging in this balancing procedure, one overriding thought must be borne in mind:

> Given the persuasiveness of modern communications and the difficulty of effacing prejudicial publicity . . . , the trial courts must take strong measures to insure that the balance is never weighed against the accused.

*Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

The analysis reveals that the accused has a high interest in not being televised over his objection, while the state has no legitimate interest in placing cameras in the courts. No

claim is made that cameras will improve the administration of justice. In addition there is no burden on the state if cameras are not in the courts.

So when the balancing test is applied the scale clearly leans toward the interest of the accused.

> In the face of demonstrated conflicts and incalculable risks, the burden of proof must shift from the potential victims to the proponents of trials by TV.

Gerbner, *Trial by television: Are we at the point of no return?*, 63 Judicature, 417, 426 (April, 1980).

**B. Common Sense Means the Burden of Proof Passes to Those Bringing Cameras Into the Courtroom.**

The court has in the past used plain old fashioned common sense to determine whether procedures are likely to deny the accused due process of law.

The court evaluated the effects of the accused wearing prison clothing during a trial. *Estelle v. Williams*, 425 U.S. 501 (1976). It is interesting what was not said. No one claimed that a scientific study was needed to show that this could influence jurors against the defendant.

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined.

*Id.* at 504.

Yet the court still ruled, basing its ruling on common sense and common knowledge, that requiring a defendant to appear in prison garb over objection was constitutionally infirm. It would only be permitted where there was no objection, where it could not be avoided or when the fact the accused was a prisoner was apparent from the case.

When certain errors are made during the trial, the majority of this court has consistently ruled that instructions cannot solve the problem.

> The naive assumption that prejudicial effects can be overcome by instructions to the jury *** all practicing lawyers know to be unmitigated fiction.

*Bruton v. United States*, 391 U.S. 123, 129 (1968) quoting from *Krulewitch v. United States*, 336 U.S. 440, 453 (Jackson, J., concurring) (1949).

The court did not ask for a scientific study to determine how jurors would act. It did not interview jurors to hear them say, "of course, I followed the instruction and rendered a fair verdict." It is obvious that persons are not going to admit to being unfair, particularly if their verdict resulted in the loss of the defendant's life, liberty or property. They may not even know in their own minds that they have been unfair.

> Human traits being what they are, no juror is going to admit in some subsequent poll that his decision was influenced by extraneous considerations such as the presence of cameras in the courtroom.

*Post-Newsweek* (Report of the Florida Conference of Circuit Judges, *supra*, at 14).

The point is, courts have recognized that it is clearly impossible to prove that what occurs in the courtroom denies the accused a fair trial. Instead, courts have relied on common sense and common knowledge. It has not said that some procedures may be unfair and others fair, and we don't know which were involved here. It has relied upon the concept that where there is the appearance of justice, there will more likely be justice. And where there is the appearance of factors that could cause injustice, then the procedures are questioned.

### C. Both Common Law and Constitutional Law Place the Burden on Those Bringing Cameras Into the Courtroom to Show There Was No Error.

The state of Florida has made a decision to bring cameras into the courts, regardless of an objection by the accused.

There is no claim that the cameras are being admitted to improve the administration of justice. While no evidence has been presented to show that television improves the image of those televised, the cameras allegedly are being brought in for that purpose. Stated simply, the cameras are being brought in as a public relations gesture to improve the image of the judges.

> [Television] will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.

*Post-Newsweek Stations, Florida,* 370 So.2d 764, 781 (1979).

Judges can best maintain a proper image by protecting the interests of all who pass before them. Public relations stunts are not a legitimate interest of the courts.

On the other hand, the Florida Supreme Court refutes its own public relations claim.

> [S]elective editing, with or without ulterior motive, can affect the accuracy with which a legal proceeding is reported.

*Id.* at 776.

The Florida Supreme Court even conceded that there are risks involved that it was willing to take.

> [W]e are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government.

*Id.* at 781.

There is, of course, a system of free and open government that does not involve the risks of which the Florida Supreme Court is not unmindful. That is, to have public trials without cameras.

Since the courts now find it their purpose to seek a good image, other changes might be introduced. Perhaps the

courts could respond to the common complaint that proceedings are dull by bringing a circus in to perform during trials. Who would be required to show that the circus distracts jurors and therefore may prevent the proper evaluation of the evidence? The courts might look at the extraneous matter put into the trial and say, the defendant must prove that the jurors were so distracted by what occurred in the courtroom that they could not fairly consider the evidence. Of course, the jurors would all announce, after the fact, that they heard and fairly considered all the evidence.

The more logical approach is for those advocating bringing in foreign matter, unrelated to the proceedings, to prove that what they are doing does not affect trial participants.

The court could always say, one cannot prove the jurors were affected, therefore the constitutional guarantee of a fair trial does not come into play. Since such reasoning is asking a criminal defendant to prove what cannot be proved, the reality of such an approach is to say the 14th Amendment does not apply to criminal trials.

We suggest the better approach to such a situation is to adopt the common law reasoning of *Chapman v. State of California,* 366 U.S. 18 (1967): "The original common law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id.* at 24.

The court further states: "[B]efore a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*

We suggest that it is the burden of the state, that publicly displays the accused for the benefit of the television industry, to show beyond a reasonable doubt that such a display did not result in a public shaming of the individual before

any conviction and beyond any sentence that may have been imposed. Further, the burden should be on the State of Florida to show, beyond a reasonable doubt, that the cameras in the court in no way affected the participants and the jurors in this case. "The courts must take such steps by rules and regulation that will protect their processes from prejudicial outside interferences." *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966).

Does the public trial guarantee mean that the presence of cameras does not change anything, since what occurs in the courts can be reported anyway. This court has been consistent in holding that "public ' trial does not mean that cameras have a right to be in the court. *Nixon v. Warner Communications,* 98 S.Ct. 1306, 1318 (1978).

To many, the public trial is a right belonging to the defendant. "Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant." *Gannett Co. Inc. v. DePasquale,* 99 S.Ct. 2898, 2905 (1979).

It would appear unseemly to use, to the defendant's detriment, a device intended for his protection. The purpose of the public trial guarantee is to allow the defendant to bring in outsiders to ensure the procedures are fair, not to expose the defendant to display by the masses.

On the other hand, those who see the Sixth Amendment as one which guarantees a common law right of a public trial (see dissent in *Gannett Co., supra*) still must examine the use of cameras in the courts to determine if it is consistent with that common law right. If the purpose of public trials is "to protect the integrity of the trial . . ." *Gannett Co., supra,* at 2930, then the effects of the cameras must be examined to see if they interfere with that concept. Opening the court to the public is far different from allowing it to

be used as a forum by politicians. Opening the court to the public is far different from exposing witnesses to the homes of other members of the community. Opening the courts to the public to ensure the integrity of the process is far different than humiliating the accused by publicly displaying him in the homes of the public.

If the common law public trial existed to ensure the integrity of the process, then it should not be used to sacrifice that integrity. If the 14th Amendment incorporates that common law protection, then what the courts do contrary to the purposes of that protection violates the 14th Amendment.

Proponents of television in the courtroom argue that public policy is better served and the public itself becomes more informed by television's presence. The Brief of the Florida Bar Opposing Post-Newsweek Stations' Proposed Rule of Judicial Conduct addresses that issue:

> Arguments of public policy are a thin and misleading disguise for a commercial venture. If broad exposure were the objective courtroom functions, then trials could easily be held in lighted coliseums at night.

*Id.* at 12.

As to the issue of education of the public, there are those who are skeptical, notably the Florida Circuit Judges.

> It appears that an effort is being made to convince the judiciary that permitting cameras in the courtroom will help to educate the public concerning the operation of the State's legal system . . . . First, it represents, we feel, a false hope. The fact is that the public will be "educated" only as to how the legal system operates in the more celebrated cases and then only as to those portions which the media feels will hold the attention of the viewing audience beyond a few seconds or minutes. The public will not be educated as to how the legal system operates the other 99% of the time simply

> because the media would have no interest —and understandably so—in showing the tedium with which the legal system is concerned in most cases. Secondly, the trial of a litigated case is not, and should never be regarded as, a civics classroom or laboratory for teaching the public how our legal system operates.

*Post-Newsweek* (Resolution of the Circuit Judges of the Fourth Judicial Circuit of the State of Florida on the Issue of Television and other Cameras in the Courtroom, at 12).

**Conclusion.**

Historically, trials have frequently served functions other than the ascertainment of truth. As Chief Justice Warren pointed out in *Estes,* 381 U.S. at 575, the Francis Gary Powers trial in the Soviet Union was televised, hardly for the purpose of insuring a fair trial. The process of televising trials for the purpose of educating the masses has continued to the present day, most recently by the new Islamic Government in Iran. California's criminal defense attorneys do not wish to allow that type of proceeding to occur in this country, either intentionally or unintentionally!

Those who have represented accused individuals, are well aware that many defendants will make decisions whether or not to seek to defend themselves against actions brought by the prosecution, because of the existence of cameras in the courts. Some, of course, will enjoy the attention. Most will be reluctant to appear. Some will agree with Benjamin Rush's words of over 200 years ago.

> "Ignominy is universally acknowledged to be worse punishment than death."

*An Enquiry into the Effects of Public Punishments Upon Criminals, and Upon Society* (Philadelphia, 1787) at 8. [Found in *American Law: The Formative Years* (Anno. Press, N.Y. 1972).]

Television then becomes "a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965). The imposition of such a burden for exercising a constitutional privilege must not be tolerated.

As this brief is being prepared, the media is full of stories of a riot that Miami suffered for several days. The reader of this brief has probably forgotten the incident; however the newspapers reported that 15 persons died. The riot began shortly after the *televised* verdict in a trial. That trial permitted cameras throughout. (*L.A. Times*, Part I, page 1, 16; May 19, 1980). It does not appear that television increased the respect of the citizens of Miami for the courts, and may have contributed to the increase in tensions and unrest following the verdict. Television may have made the citizens feel they were participants in the trial itself.

The previous paragraph was written May 20, 1980. On May 22, the *Los Angeles Times* carried the following article, Part I, page 10. Byline Miami. "RIOT RENEWS DEBATE OVER TV COVERAGE OF TRIALS." The article quoted several people who thought the brief television excerpts on the evening news distorted the proceedings, thereby inflaming the community. It noted that some attorneys stated that "television viewers here did not see the same trial that the jury saw." Attorneys and news media people, according to the article, agreed that "two courtroom events lent themselves readily to television coverage." The article went on to state the view of the defense attorneys regarding the coverage of the dramatic moments.

> [I]t is much harder to see or understand in brief television segments the slow, methodical processes of corroborating testimony, impeaching witnesses and estab-

lishing individual culpability that are fundamental to a criminal trial.

Once again we find that cameras are neither educational nor do they increase the confidence of the public in the system.

The courts do not exist for the purpose of education, entertainment, or public relations.

Unrestricted televising of trials will influence the behavior of all who appear and permanently cause the soundness of the system to be questioned.

Government may properly exercise its power to force a person to appear at a trial. However, when government then subjects that person to non-essential public display, such action constitutes an assault on human dignity.

Respectfully submitted,

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No. 79-1260

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

NOEL CHANDLER AND ROBERT GRANGER,
*Appellants,*

v.

STATE OF FLORIDA,
*Appellee.*

**On Appeal from the Supreme Court of the State of Florida**

## MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE CBS INC.


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August 18, 1980

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 79-1260

NOEL CHANDLER AND ROBERT GRANGER,
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STATE OF FLORIDA,
*Appellee.*

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**On Appeal from the**
**Supreme Court of the State of Florida**

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## MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE CBS INC. IN SUPPORT OF APPELLEE, THE STATE OF FLORIDA

Pursuant to Rule 36.3 of the Rules of this Court, CBS Inc. hereby moves for leave of this Court to file this Brief Amicus Curiae in support of the position of appellee, the State of Florida.

The grounds for this motion are as follows:

1. Appellants have granted consent to the filing of this amicus brief, but appellee, the State of Florida, has declined to grant its consent. Accordingly, this motion is being filed pursuant to Rule 36.3 of the Rules of this Court.

2. This case involves the question of whether television coverage of appellants' trial denied them their right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments.

3. CBS Inc. ("CBS") operates radio and television networks, and owns VHF television and radio stations located in major cities throughout the United States. The CBS Television Network and CBS Radio Network maintain worldwide news-gathering organizations and each CBS owned station also maintains its own news department. CBS has generally sought to foster the First Amendment rights and interests of the broadcast press through participation in numerous Supreme Court and lower federal court cases.

CBS believes that its journalists have been severely hampered in reporting criminal and civil proceedings by their inability to present the news as it happens through camera and audio coverage of such judicial proceedings. CBS therefore has a strong interest in having the Florida Supreme Court rule permitting television coverage of criminal proceedings upheld. In addition to its commitment and concern in the First Amendment area generally, CBS has a special interest in this case because it participated in the development of much of the equipment now utilized for televised coverage of criminal trials. It is the development of this equipment which provides one of the grounds for distinguishing this case from this Court's earlier decision in *Estes* v. *Texas*, 381 U.S. 532 (1965).

4. This case presents several important issues regarding the State of Florida's interest in providing television coverage of criminal trials, and the interests of CBS and other media in securing access to and providing coverage. Appellee and the several amici in their briefs ably discuss many aspects of these issues. However, CBS believes that its brief can make a useful contribution to this Court in reaching its decision in this case by providing discussion and material on several issues that otherwise will not be addressed in depth.

For example, while other amici participating in this case are involved in news-gathering activities, the pri-

mary focus of their briefs is on other issues and they therefore do not discuss the First Amendment issues in detail. CBS's brief provides this Court with a full discussion of these important questions.

In addition, appellants urge that this Court's decision in *Estes* requires reversal of their convictions. CBS believes that resolution of the question of the significance of *Estes* to this case requires a technical discussion and comparison of the kind of television camera equipment available at the time of the *Estes* trial with that used today, and the CBS amicus brief contains such a comprehensive technical discussion. Also, CBS's brief analyzes the record of this case in detail to demonstrate that the circumstances in *Estes* found to deprive defendant of a fair trial were not present here.

Accordingly, CBS hereby moves this Court for leave to file the following amicus brief in support of the position of appellee.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 79-1260

NOEL CHANDLER AND ROBERT GRANGER,
*Appellants,*

v.

STATE OF FLORIDA,
*Appellee.*

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**On Appeal from the Supreme Court of the State of Florida**

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## BRIEF FOR AMICUS CURIAE CBS INC.

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### INTEREST OF AMICUS CURIAE CBS INC.

CBS Inc. operates radio and television networks, and is the owner of VHF television and radio stations located in major cities throughout the United States. The CBS Television Network and the CBS Radio Network maintain worldwide news-gathering organizations, and each of the CBS owned stations also maintains its own news department. At CBS there are more than 1500 individuals engaged in the news-gathering process.

For many years CBS has sought to foster the ability of its own newsmen and those of other news organizations to gather and report the news, including news as to criminal and civil proceedings. CBS believes that it has been severely hampered by its inability to present the news as it happens through camera and audio coverage of such judicial proceedings.

In addition, CBS has generally sought to foster the First Amendment rights and interests of the broadcast media through participation in numerous cases in the Supreme Court and lower federal courts. Moreover, CBS has a strong interest in affirmance of the Florida Supreme Court rule permitting television coverage of criminal proceedings and in rejection of the contention of appellants that such coverage is *per se* unconstitutional.[1] CBS has a special interest in this case because it participated in the development of much of the television camera equipment that is used in coverage of judicial and other proceedings and that was used in coverage of appellants' trial.

## SUMMARY OF ARGUMENT

The Florida courts correctly held that, absent any showing of actual prejudice, the televised coverage of appellants' trial pursuant to the provisions of Canon 3A(7) of the Florida Code of Judicial Conduct did not deprive the appellants of their right to a fair trial.

## I.

In *Richmond Newspapers* v. *Virginia*, 100 S. Ct. 2814 (1980), this Court recently held that, in view of the public's pressing need for information about the criminal justice system, the public and the press have a First Amendment right to attend and to gather information about criminal trials. The same interests which this Court found constitutionally significant in *Richmond Newspapers* support the State of Florida's decision to permit television coverage of criminal trials.

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[1] While the Florida rule permits coverage of trials by radio as well as television cameras and CBS believes such coverage also serves the public interest, this case concerns the constitutionality of television coverage of criminal trials and this brief accordingly will be limited to that issue.

In view of the inaccessibility of modern trials to the public generally, the press plays an important role as surrogate in informing the public as to the conduct of criminal trials and the functioning of the judicial system. Television can play a unique role in communicating such information since it can reproduce the actual events of the trial. In opening its courtroom to television coverage under appropriate safeguards, Florida properly sought to vindicate the First Amendment interests recognized by this Court in *Richmond Newspapers*.

## II.

Press coverage of criminal trials also vindicates Sixth and Fourteenth Amendment interests in the impartial administration of justice by publicizing the events of the trial and thereby discouraging perjury and misconduct by trial participants and encouraging persons with relevant information to come forward. This Court's 1965 decision in *Estes* v. *Texas*, 381 U.S. 532 (1965), holding that televised coverage of that proceeding violated the defendant's right to a fair trial, should not be held to bar televised coverage of criminal trials under appropriate safeguards. *Estes* did not establish a *per se* rule against televised coverage of all criminal trials. Rather, *Estes* has been viewed as turning on the particular and unusual facts of the case and the "circus-like" atmosphere prevailing during that particular trial. It also rested on the limited "state of the art" of television camera equipment available and on the public's unfamiliarity with and lack of exposure to television coverage generally.

This case is clearly distinguishable from *Estes*. Appellants' trial was conducted in a dignified atmosphere, and no actual or probable prejudice was shown. The technological revolution in television camera equipment that has occurred since the *Estes* trial in 1962 now allows courtroom proceedings to be covered in a manner which is nondisruptive of courtroom decorum. Moreover, the pub-

lic's perception of television has changed, and there is no reason to believe that televised coverage of criminal trials has significant adverse psychological effects on the participants.

## ARGUMENT

### I. STRONG FIRST AMENDMENT INTERESTS ARE SERVED BY THE FLORIDA SUPREME COURT'S RULE PERMITTING THE TELEVISING OF CRIMINAL TRIALS.

In *Richmond Newspapers* v. *Virginia*, 100 S. Ct. 2814 (1980), decided this term, this Court held that the public and the press have a right protected by the First Amendment to attend and to gather information about criminal trials. Although there was no majority opinion, the plurality and concurring opinions[2] based this broad "right of access" on the "unbroken and uncontradicted" history of open trials and on the importance to the public of the manner in which criminal trials are conducted.[3] The Court also recognized the vital role of the press, as representatives of the public, in gathering and disseminating information about the criminal justice system. The Court in *Richmond Newspapers*, however, did not reach the specific question of whether television news broadcasters have a First Amendment interest in bringing television camera equipment into the courtroom to provide televised coverage of trials.

This case involves only the single question whether a state *may* constitutionally permit television coverage of criminal trials. It does not raise the question of whether a state *must* permit such coverage, but only whether the

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[2] Mr. Chief Justice Burger, joined by Justices White and Stevens, wrote the plurality opinion; Mr. Justice Brennan, joined by Mr. Justice Marshall, and Justices Stewart and Blackman, in separate opinions, concurred in the judgment. Mr. Justice Rehnquist dissented.

[3] 100 S. Ct. at 2825 (Opinion of Burger, C.J.).

Sixth or Fourteenth Amendment forbids a state from seeking to vindicate strong First Amendment interests in television coverage of criminal proceedings.

We suggest that the same interests which the Court found constitutionally significant in *Richmond Newspapers* support a State's decision to permit television coverage of trials. The public has a pressing need for information about the criminal justice system. Indeed, as the plurality noted in *Richmond Newspapers*, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted . . . ."[4] Information about the judicial system enables the public to determine whether that system as a whole and the conduct of individual trials are "fair and right." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950). Information about criminal proceedings also enables people to vote intelligently for prosecutors and elected judges—an election process which Florida has adopted—and to "register opinions" on issues of judicial administration. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975).

As the opinions in *Richmond Newspapers* recognized, public awareness of criminal trials also promotes community acceptance and support of the criminal justice system by enabling the public to observe and evaluate the trial process along with the results.[5] Moreover, information about trials has a therapeutic value in that it provides the community with an opportunity to express outrage and frustration at the commission of a particu-

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[4] *Id.* at 2827 (Opinion of Burger, C.J.).

[5] *Id.* at 2824-25 (Opinion of Burger, C.J.); 2837 (Brennan, J., concurring).

larly heinous offense, to restore a sense of security and to satisfy the need for retribution.[6]

While in an earlier age the public's need for information about the criminal justice system may have been adequately met by the attendance at criminal trials in the local community, the pace and type of life in America has changed drastically in recent decades. The local county courthouse is no longer, as a practical matter, easily accessible.[7] Therefore the press—both the print and electronic media—in its special role as representative of the people, must funnel observations and information about trials to the growing public that cannot attend. As the plurality in *Richmond Newspapers* explained:

> "Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates of the public." [8]

Notwithstanding appellants' claims to the contrary,[9]

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[6] *Id.* at 2824-25 (Opinion of Burger, C.J.).

[7] *Id.* at 2825 (Opinion of Burger, C.J.); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

[8] 100 S. Ct. at 2825 (Opinion of Burger, C.J.).

[9] Appellants in their brief persistently denigrate the role of television in making information about governmental—especially judicial—affairs available to the public. For example, they contend that "televising of criminal trials does not contribute to, or otherwise promote that lofty end" of public trials which they claim is simply "to protect the accused." App. Br. at 26. Rather, "[t]elevision is like the 'Devil's Hook'—so tempting yet so dangerous . . . . No good can come of it." *Id.* at 71. "Even if the electronic media had a Constitutional right to televise a trial," they argue, the information broadcast would be useless because "people simply cannot absorb meanings at the speed of light." *Id.* The suggestion seems to be that the public cannot be trusted with information provided by television.

television has a special role to play in communicating information about the judicial system, and the numerous limitations imposed by the states upon the electronic media's reporting of criminal trials may have had significant adverse effects on the public's awareness of the conduct of criminal proceedings.[10]

There can be no question now that televised coverage of criminal trials would reach large elements of the public who look to television as its primary source of news. Television is an overridingly significant source of news in and of American life. In fact, according to a recent study, it is the principal source of news for more than two-thirds of the American public and for one-third television is the sole source of news.[11] In addition, over the last ten years, television has been identified by a more than two-to-one margin as the "most trusted" source of news.[12]

It may be urged, however, that even if cameras are excluded from the courtroom, television reporters and sketch artists with pad and pencil would still be able to attend criminal trials and report the events. But since television is a visual medium, the denial of access to

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[10] In fact, a recent study indicates that the public is shockingly ignorant or skeptical about the judicial system. *See* 1 Yankelovich, Skelly and White, Inc., THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS AND COMMUNITY LEADERS, prepared for the National Center for State Courts, May, 1978. For example, the study reports that 77 percent of the public has little or no familiarity with federal courts; 74 percent with state courts; and 63 percent with local courts. Moreover, 37 percent of the public believes that a person accused of a crime must prove his or her innocence and 25 percent believe that court decisions are primarily affected by political considerations. *Id.* at 13-14, 30.

[11] Roper Organization, Inc., PUBLIC PERCEPTIONS OF TELEVISION AND OTHER MASS MEDIA: A TWENTY YEAR REVIEW 1959-1978 (April 1979).

[12] *Id.* at 4.

the courtroom of television cameras places a severe limitation upon the ability of television to perform its normal function of informing the public.[13] Moreover, the electronic medium, if limited to merely descriptive reporting, is deprived of the ability to present a reproduction of the actual event and is unable to communicate the crucial tones, inflections, gestures, impatience or inattentiveness—qualities which this Court noted in *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972), constitute the "atmosphere" of a court proceeding. Broadcasters, if permitted to televise criminal trials, could contribute substantially to increased public awareness and understanding of the judicial system. The Brief Amici Curiae of the Florida News Interests notes that this has been precisely Florida's experience with regard to television coverage of trials. Since television cameras are able to record trials, the televised nightly news has contained many more stories of trials which are longer, more detailed and reflect actual events in the courtroom. This coverage has increased public awareness of and enhanced the public's perception of the judicial system; it has also contributed to lively and informed debate about important public issues. *Id.*

The special role of television in informing the public has increasingly been recognized in the context of both governmental proceedings generally and criminal proceedings. For example, Congress has permitted such coverage of both Senate and House Committee meetings since 1970,[14] and the House of Representatives recently began

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[13] Indeed, the same study by Yankelovich, Skelly and White, Inc., *supra* n.10, reported that "the public generally feels that media coverage today is not adequate to show how the court system works nor how effective it is [and] there is widespread opinion that media should play an expanded role in showing how the courts work and how effectively they operate . . . ." *Id.* at 58.

[14] Senate Rule XXVI, 5(C), S. Doc. 96-46, Standing Rules of the Senate, 96th Cong., 2d Sess. (Mar. 25, 1980).

live audio and film coverage of its floor debates.[15] The same policy has caused the Florida legislature to permit television coverage of meetings of administrative agencies and legislative deliberations[16] as well as judicial proceedings. And as the Joint Brief for Amici Curiae Radio Television News Directors Association *et al.* demonstrates, an increasing number of states presently allow for some form of television coverage of criminal proceedings in recognition of the importance of television to greater public awareness of the court system.

Whether these strong First Amendment interests create a constitutionally protected right to televise criminal trials need not be decided in this case.[17] As we have noted, this case presents only the question whether a state may, constitutionally, permit television coverage of criminal proceedings with appropriate safeguards.[18] We submit the answer to that question is clearly in the affirmative.

In adopting the experimental rule at issue in this case, the Florida Supreme Court in *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764 (Fla. 1979), while finding no constitutional right of broadcasters to televise criminal trials, clearly sought to vindicate the same

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[15] *See* H. Res. 866, 95th Cong., 1st Sess., 123 Cong. Rec. 11678 (1977); 123 Cong. Rec. H. 11679 (daily ed. Oct. 27, 1977) (Rep. Sisk).

[16] *See* discussion *infra* at 28; a more complete discussion of Florida's commitment to open government may be found in the Brief Amici Curiae of the Florida News Interests.

[17] In *United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 102 (5th Cir. 1974), the Fifth Circuit held that failure to allow sketch artists with their pencils and notebooks into courtrooms was an impermissible prior restraint on freedom of the press absent any showing that the sketching was disruptive or obtrusive.

[18] The Florida Supreme Court rule permitting televised coverage of criminal trials is accompanied by numerous safeguards concerning the type of equipment, number of cameramen and technicians and placement of equipment that may be used in the courtroom. *See* discussion *infra* at 22-26.

First Amendment interests which this Court recognized in *Richmond Newspapers*.[19] Even Mr. Justice Rehnquist's dissenting opinion in *Richmond Newspapers*, 100 S. Ct. at 2842, would support the Florida Supreme Court's decision, for that dissent stressed the importance of allowing states to make their own judgments as to the opening of criminal trials to media coverage.[20]

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[19] *See* 370 So. 2d at 780-81.

[20] Appellants rely on the due process clause of the Fourteenth Amendment to support a *per se* rule barring cameras from the courtroom. But, as this Court has noted, the requirement of due process in state criminal proceedings is, in fact, a "comman[d], not [of] a particular procedure, but only [of] a result"—that of " 'fundamental fairness . . . [in] fact finding.' " *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 554 (1971) (Brennan, J., concurring, *quoting* Blackmun, J.). This Court has been very reluctant to recognize *per se* rules in this area in recognition of the right of states to establish individual procedures to govern criminal proceedings within their jurisdictions. *See, e.g., Manson* v. *Brathwaite*, 432 U.S. 98 (1977) (Court declined to adopt a *per se* rule excluding out-of-court identification evidence whenever it is obtained through unnecessarily suggestive confrontation procedures); *Henderson* v. *Kibbe*, 431 U.S. 145 (1977) (Court held that erroneous or omitted jury instructions, without more, are insufficient to render the entire proceeding unfair); *Ristaino* v. *Ross*, 424 U.S. 589 (1976) (Court declined to impose a mandatory requirement that veniremen be examined concerning their possible prejudice in cases involving confrontations between members of different races); *United States* v. *Marion*, 404 U.S. 307 (1971) (Court held that a 38-month post-indictment delay in a criminal trial was not unconstitutional absent a showing of actual prejudice to the conduct of the defense).

Thus states have been granted wide discretion to develop and use procedures which might be mandated for criminal trials in federal court. *See, e.g., North* v. *Russell*, 427 U.S. 328 (1976); *Williams* v. *Florida*, 399 U.S. 78 (1970). And in such cases this Court has adhered to a critical admonition of Justice Cardozo: A state rule of law "does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *see Spencer* v. *Texas*, 385 U.S. 554 (1967); *Bucholter* v. *New York*, 319 U.S. 427 (1943).

Experimentation of the sort conducted by Florida allows the state to define the best method of conducting its own criminal proceedings and to make an independent judgment as to the best method of informing its people about the conduct of criminal trials. Moreover, such experimentation provides an important source of empirical data which can be useful to other states and the federal courts in determining whether to permit televised coverage of criminal trials. We suggest that nothing in the Constitution forbids such state experiments with camera coverage of criminal trials.

## II. TELEVISION COVERAGE OF APPELLANTS' TRIAL PURSUANT TO FLORIDA'S RULE DID NOT DEPRIVE APPELLANTS OF A FAIR TRIAL.

Press coverage at criminal trials not only serves First Amendment interests, but also vindicates Sixth and Fourteenth Amendment interests in the impartial administration of justice. For example, as this Court noted in *Richmond Newspapers*, publicity discourages perjury and misconduct of trial participants by exposing them to public review. It also encourages judge, jury and counsel to perform their duties more conscientiously. Moreover, press coverage of a trial makes it possible for persons who might not otherwise know that they have information relevant to the trial or who could rebut false testimony to come forward and testify. Indeed, accurate fact-finding, enhanced by press coverage of trials, benefits the defendant by assuring him a fair trial, and the public by preventing a miscarriage of justice that results in imprisonment of an innocent person while the offender remains at large.[21]

Appellants nonetheless argue that the televising of criminal trials is a *per se* violation of the Sixth Amendment. They rely almost exclusively upon this Court's 1965

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[21] *See* 100 S. Ct. at 2824 (Opinion of Burger, C.J.); 2838 (Brennan, J., concurring).

decision in *Estes* v. *Texas*, 381 U.S. 532 (1965).[22] In view of appellants' contention that *Estes* is dispositive of this case, a brief discussion of the facts in *Estes* is appropriate. Billy Sol Estes, a highly-publicized financier, had been indicted by a Texas County grand jury for theft, swindling and embezzlement. The Court found that massive pretrial publicity in that case had given the trial national notoriety and that the pretrial proceedings and trial had been conducted in a "carnival atmosphere." *Id.* at 577. This "carnival atmosphere" was found to have resulted in part from media coverage of the pretrial and trial proceedings. Portions of both proceedings had been broadcast live by radio and television and the court pointed out that numerous television cameras, cameramen and technicians had been stationed throughout the courtroom. *Id.* at 535-36, 552-53. A mass of cables and wires were "snaked across the courtroom floor" and glaring lights and noise interfered substantially with the solemn dignity and decorum of the courtroom. *Id.* Moreover, the Court noted that the trial judge was "harassed" throughout the proceedings by the presence of television cameras and was forced to enter numerous orders restricting the location and use of the television equipment, thereby adding to the confusion of jury and other trial participants. *Id.* at 551. As the Court noted:

> "[A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings." *Id.* at 536.

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[22] App. Br. at 37.

The Court relied heavily on this disruption in finding that television and other media coverage of the pretrial hearing and trial deprived the defendant of a fair trial.[23] Yet even under these circumstances, *Estes* was decided by a five to four vote.

While the opinion of Justice Clark in *Estes* is designated a "majority" opinion, it makes clear that Justice Harlan, who provided the necessary fifth vote for the majority, joined in the Court's opinion "subject to the reservations and to the extent indicated in his concurring opinion . . . ." 381 U.S. at 534. That concurring opinion makes clear that Justice Harlan joined the majority only because the case was "notorious" (*id.* at 587), that is, because it "was a heavily publicized and highly sensational affair." *Id.* at 590.

While rejecting a First Amendment right of the media to televise criminal trials, and finding a denial of due process in that particular case, Justice Clark's opinion noted that even in *Estes* a different result might obtain as a result of future changes in technology and the public's "adjustment to [the] presence" of television cameras. *Id.* at 551-52. Similarly, Justice Harlan's opinion stated that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." *Id.* at 595-96.

It is thus clear that *Estes* was, to a significant extent, dependent upon its unique and, so far as we know, never repeated facts. It is equally plain, as Mr. Justice Brennan emphasized in his dissenting opinion, "only four of the five Justices voting to reverse rest[ed] on the proposi-

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[23] Justice Clark's opinion focused on the pretrial hearing because of the importance of publicity at this stage of the proceeding, the fact that the veniremen were present in the courtroom, and the fact that four members of the trial jury were exposed to the pretrial hearing. 381 U.S. at 535-36. Justice Harlan's opinion focused on the trial itself.

tion that televised criminal trials are constitutionally infirm, whatever the circumstances." *Id.* at 617. And in the three cases in which this Court has since discussed *Estes* in detail, it has not suggested that *Estes* established a *per se* rule against television coverage of criminal trials. Thus, in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), decided less than one year after *Estes*, the Court concluded after an extended comparison of the two cases that, in *Sheppard* as in *Estes*, it was "the totality of circumstances" that warranted reversal. 384 U.S. at 352. Similarly, in *Murphy* v. *Florida*, 421 U.S. 794 (1975), the Court stressed that in *Estes* the intrusive and disruptive actions by the press, including television broadcasters, created a "circus atmosphere" which deprived the defendant of a fair trial. Again, in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), the Court emphasized that the particular facts in *Estes* led to a finding that due process had been denied. *Id.* at 552.[24]

Similarly, three recent federal courts of appeals decisions viewed *Estes* as having been based upon the totality of facts presented and not upon a conclusive presumption that television is prejudicial. For example, in *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir. 1980), the Third Circuit concluded that prejudice amounting to a denial of due process would be presumed only where the news media pervaded the proceedings, such as the trial in *Estes* "where cumbersome television equipment invaded the courtroom." *Id.* at 995. Similarly, in *Brinlee* v. *Crisp*, 608 F.2d 839 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 737 (1980), the court held that the conviction in *Estes* had been reversed because the "circus atmosphere" had deprived the defendant of a fair trial. *Id.* at 847. And in *United States* v. *Capo*, 595 F.2d 1086

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[24] Similarly, none of the references to *Estes* in this Court's opinions in *Richmond Newspapers* suggests that the *Estes* case establishes a *per se* ban on the televising of criminal trials. *See* 100 S. Ct. at 2821, 2826, 2827, 2830, 2833, 2837.

(5th Cir. 1979), *cert. denied*, 100 S. Ct. 660 (1980), the Fifth Circuit stated that prejudice was presumed in *Estes* because

> "the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom, transforming the trial into an event akin to a three-ring circus." *Id.* at 1090-91 (citation omitted).

Thus, subsequent decisions both of this Court and the lower federal courts clearly indicate that the holding in *Estes* was dependent on the particular and unusual facts of that case. We suggest that this case is distinguishable from *Estes* on at least three separate grounds:

First, and most importantly, there is no evidence whatever that appellants' trial here "was a heavily publicized and highly sensational affair" or that it was conducted in a "circus" atmosphere, and there is no indication that there was any actual or probable prejudice as a result of the television coverage of appellants' trial.

Second, present technology utilized in the coverage of criminal trials generally—and utilized in this case—is substantially different from that utilized at the time of *Estes*, and is not likely to disrupt the dignity or decorum of a criminal trial.

Third, in view of the public's familiarity with and acceptance of television today, the concerns expressed in *Estes* as to the adverse psychological impact of television coverage on trial participants are no longer valid, and there is no sound basis for presuming that any significant adverse psychological effects on jurors, witnesses or other participants occur.[25]

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[25] A fourth significant distinction, discussed in the Joint Brief for Amici Curiae Radio Television News Directors' Association *et al.*, is that the Court in *Estes* found it constitutionally significant that almost all the states had rules prohibiting television coverage of trials. A great change has taken place since *Estes*, and now a

### A. Appellants Have Made No Showing of Actual or Probable Prejudice as a Result of Television Coverage of Their Criminal Trial.

The Florida rule which appellants challenge in this case in fact carefully and specifically provides for protection of criminal defendants to ensure that coverage will not and cannot create a disruptive atmosphere. Indeed, the Florida Supreme Court explicitly stated that "in certain circumstances it is appropriate to prohibit electronic media coverage of particular participants," and it provided the presiding judge with discretion to bar television coverage where appropriate. *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764, 779. Subsequent state court decisions demonstrate that this discretion has been exercised to exclude television cameras where there is reason to apprehend possible prejudice to the defendants.[26]

Appellants objected generally to any camera coverage of any aspect of their trial,[27] and claim that television coverage is inherently and always prejudicial.[28] But appellants have made no showing, nor do they claim, that the Florida rule permitting camera coverage of criminal trials was in any way violated in their case. Moreover, they did not seek to restrict camera coverage of any particular aspect of the trial on the ground that prejudice was likely to occur and they do not now claim any particular prejudice from coverage of their trial.

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significant number of states allow television cameras to be present at criminal trials.

[26] For example, in *Green* v. *State*, 377 So. 2d 193 (Fla. 3d DCA 1979), an appellate court reversed a conviction because the trial court had failed to allow the defendant an evidentiary hearing to prove that she would be prejudiced by the presence of television cameras in the courtroom. *See also Palm Beach Newspapers, Inc.* v. *State*, 378 So. 2d 862 (Fla. 4th DCA 1979); *King* v. *State*, No. 52,185 (Fla. May 8, 1980).

[27] Tr. at 55-57.

[28] App. Br. at 37.

The record indeed discloses that during appellants' trial the Florida rule was faithfully complied with and that appellants suffered no prejudice.

The circumstances of appellants' trial were routine and clearly did not constitute a "highly publicized and sensational affair." [29] On December 5, 1977, appellants, two Miami Beach police officers, were tried and convicted on a four-count indictment of the May 23, 1977 burglary of Picciolo's Restaurant in Miami Beach.[30] The state introduced testimony and a tape-recording made by a Mr. Sion who heard, and subsequently taped, a conversation on his short-wave radio regarding a burglary in progress.[31] The prosecutor alleged that the recorded conversation was one between appellants using walkie-talkies and that it occurred while they were burglarizing Picciolo's Restaurant.[32] Mr. Sion, his mother and a friend who had listened to the tape recording, as well as several Miami Beach police officers testified for the prosecution,[33] and appellants' wives testified for the defense.[34] Appellants themselves did not testify.

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[29] *Estes*, 381 U.S. at 590.

[30] Tr. at 1080-83.

[31] Tr. at 362-455; 859-61.

[32] Tr. at 1001-34.

[33] Police officers testified that they had seen appellants cruising in their police car in the area of Picciolo's Restaurant on the evening of May 22 and early morning hours of May 23, 1977 and that they were not on duty at the time. Mr. Sion, his mother and the friend testified about the circumstances surrounding the making of the tape recording and that, to the best of their recollection, the recording was made on May 23, 1977. Tr. at 362-455 and 859-62 (Mr. Sion); Tr. at 863-73 (Mrs. Sion); Tr. at 702-41 (Mr. Froschneider).

[34] Appellants' alibi defense—testified to by their wives—was that each had been at home on the evening of May 22, went to bed about

Like the case itself, the pretrial and trial coverage by the print and broadcast media of the appellants' case was routine. Indeed, television cameras were not even present during the pretrial suppression hearing,[35] and were present only on two occasions during the three and one-half day trial.[36] We understand that news coverage of the trial consisted of only a few brief reports shown on consecutive evening news broadcasts.[37] At no time did appellants claim that adverse pre-

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11 p.m. and did not leave his home until late the next morning. Tr. at 895-902 (Mrs. Granger); Tr. at 903-22 (Mrs. Chandler).

At an earlier hearing to suppress the tape recording evidence, appellants claimed that their voices were those on the tape but that it had been made on May 30, 1977—a week after the actual burglary—and that they had "staged" the burglary in order to see if anyone was listening to their walkie-talkie station. Tr. at 25-38.

[35] Appellants claim that the fact that no television cameras were present at the pre-trial hearing is "fortuitous." App. Br. at 6. Since television stations in Florida are permitted to cover pretrial hearings, we suggest that the reason this particular hearing was not covered was because the television stations did not consider it sufficiently newsworthy.

In *Estes* at the pre-trial hearing at least twelve cameramen were present taking motion and still pictures and televising the proceedings live. All the seating in the courtroom was taken and at least 30 people were standing in the aisles. 381 U.S. at 535-36, 552-53.

[36] Tr. at 55, 57, 65, 357.

[37] The actual Florida experience with television coverage of criminal trials, described in detail in the Brief Amici Curiae of the Florida News Interests, together with the experience with the television coverage of the Chandler trial, refute the hypothetical fears articulated by Chief Justice Warren in his concurring opinion in *Estes* regarding televised trials. 381 U.S. at 571-74. Trials are not perceived by Floridians as a form of entertainment; they are not scheduled so as to enhance television station ratings nor to accommodate prime time viewers; television broadcasters do not "hype" the trials that are televised by focusing on personalities and providing legal "play by play" analysis of the defense and prosecution

trial publicity prevented them from getting a fair trial by an impartial jury. In addition, unlike petitioners in *Estes*,[38] appellants here did not move for a change of venue or seek a continuance on the ground that adverse pretrial publicity made a fair trial impossible.

The actual process of televising the trial was also routine and not disruptive, and there is also no suggestion in the record that the presence of television cameras during portions of appellants' trial disturbed the proceeding.[39] Moreover, unlike the judge in *Estes*,[40] the trial judge here was clearly not "harassed" by problems with cameras and his attention was not diverted by issuing orders regarding camera coverage of the proceeding.[41]

In the course of the *voir dire*, during which a television camera was present, each prospective juror was informed by appellants' counsel that he or she was "likely

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strategy; neither do they insert "[c]ommercials for soft drinks, soups, eyedrops and seatcovers . . . when there [is] a pause in the proceedings." *Id.* at 571.

Rather, Floridians are generally provided with brief segments of trials—as in *Chandler*—on the televised evening news in much the same way that they are provided with news segments about local and national legislative events and presidential activities. Television coverage of trials, far from being regarded by either television broadcasters or the public as entertainment, is perceived as an extremely useful way to convey information about the judicial system and to alert people to significant public issues.

[38] In *Estes*, a continuance of one month was sought and granted on this ground. 381 U.S. at 535-36, 554.

[39] Appellants acknowledge in their brief that "the cameras' operations are less disruptive by virtue of technological improvements." App. Br. at 28. There is also no evidence of any disruption caused by still cameras.

[40] 381 U.S. at 551, 568-69.

[41] On one occasion the court here did advise the cameraman that no adjustment to the camera during the trial was permitted. Appendix at 15.

to be on television as a result of this case," and asked whether "that fact [would] affect you in some way."[42] Each replied that it would not.[43] And all the prospective jurors said that if they were instructed by the judge not to "watch anything or to turn on television in order to see yourself in connection with this trial," they could comply. *Id.* at 10. In fact, in neither of the two brief segments of the trial that were televised was the face of any juror shown.

The court also instructed the jury prior to its first night's recess "to avoid seeing and hearing anything about this case as reported in any of the media," and suggested that "[p]erhaps it might be a good idea if you just avoid the local news and watch only the national news on television."[44] At the conclusion of the state's case the Court cautioned the jury to "[p]lease remember and carefully abide by those instructions."[45] Again, at the conclusion of the evidence the Court explained, "at this time it is most important . . . that you carefully remember and carefully abide by the instructions I gave you at the beginning of each of the nightly recesses we have had in the past."[46] The record reveals no evidence suggesting that any juror failed to comply with these

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[42] *Id.* at 9.

[43] *Id.* at 8-12. Moreover, three prospective jurors—not two, as appellants incorrectly claim, App. Br. at 6—stated that they had been on television, thus indicating some familiarity with the process of being televised. Appendix at 10. One of these persons actually served on the jury in this trial. Tr. at 205.

Contrary to appellants' statement, App. Br. at 6, the record does not reflect that "one juror at first said that she thought that the presence of the camera during the trial would lead her to believe '. . . there is something special about this case.' (A-9)." *See* Appendix at 9-10.

[44] *Id.* at 13. There was no national news coverage of the trial.

[45] *Id.* at 16.

[46] *Id.*

instructions in any way. Appellants did not seek any other or additional instructions to the jury in this regard.

Appellants also make no showing that the witnesses testifying at trial were adversely affected by the presence of cameras during the trial, nor does the record suggest otherwise. No witness requested that he or she not be televised.[47] The court, at the request of appellants' counsel, directed counsel to "instruct each of your witnesses not to watch any television coverage of this trial." [48] There is no evidence that any witness violated these instructions.

There is also no suggestion that any witness was reluctant to testify because of the presence of cameras. There is, further, no suggestion that either the prosecution or the defense chose not to call any witness because of television coverage of the trial.

As this summary reveals, the facts in this case are vastly different from those which confronted this Court in *Estes*. There is no suggestion, much less any showing, that a "circus atmosphere" prevailed, or that the actual atmosphere of the courtroom here differed in any material respect from that prevailing throughout the United States in the hundreds of criminal trials conducted each day. In view of the fact that *Estes* rests so clearly on its particular facts and the finding of probable prejudice on those facts, we suggest that this case is clearly distinguishable from *Estes*.

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[47] App. Br. at 7.

[48] Appendix at 14. Appellants' brief inaccurately describes the record on this point by implying that the judge ignored their request for instructions to the witnesses. App. Br. at 7.

**B. Present Technology Utilized in the Coverage of Trials Generally—and Utilized in This Case—Is Substantially Different From That Utilized at the Time of Estes.**

Not only was the actual conduct of this trial very different from *Estes*, but television camera equipment in use today, and which was utilized in the trial of these appellants, is substantially different from the cumbersome equipment available at the time of the *Estes* case, thus alleviating the concerns expressed in *Estes* as to the intrusive nature of that equipment.

While neither the record nor the opinions in the *Estes* case comprehensively catalogs and describes the equipment that was present in the *Estes* courtroom, the opinions and the accompanying photographs clearly reveal that the equipment utilized in that trial was typical of the television equipment available at the time, which is described generally in the technical literature.[49]

The Court noted in *Estes* that at least six studio cameras were present at the pretrial hearing, two set up inside the bar and four others immediately outside the gates, and at least four such cameras were stationed in a specially constructed booth in the rear of the courtroom during the trial. 381 U.S. at 553. At the time of the *Estes* trial cameras utilized vacuum tubes rather than transistors, and studio cameras accordingly weighed approximately one hundred pounds and were extremely large—about two feet long, one foot wide and one and one-half feet high. As a result of its size and weight, a studio camera was usually mounted on a bulky tripod

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[49] *See, e.g., Color TV Cameras Dominate NAB Show,* BROADCASTING, April 17, 1967, at 52-55; *Broadcasters Get Wide Color Camera Choice,* BROADCASTING, April 11, 1966, at 60-65; *Plumbicon Cameras Ready,* BROADCASTING, Feb. 22, 1965, at 110; *Sylvania, RCA Unveil New Portable Cameras,* BROADCASTING, Jan. 27, 1964, at 64.

with a large mounting head and occupied approximately seven square feet of floor space. Also, at this time television cameras could not operate efficiently without high levels of illumination far above those found in a normal courtroom setting, and it is clear on the *Estes* record that at the time of the pretrial hearing in that case, special flood lights were utilized which could cause substantial heat and glare.

Moreover, at the time of *Estes* television cameras were not self-contained units as they are today. The power supply, control unit and synchronization generator, all essential to the transmission of the picture, were contained in a mobile van. In *Estes*, the concurring opinion of Chief Justice Warren pointed out that "'[a] television motor van, big as an intercontinental bus, was parked outside the courthouse . . . .'"[50] and contributed substantially to the disruption that pervaded the *Estes* trial. In order to connect each camera to the van, two sizeable cables were required. A cable of more than one inch in diameter was required to connect each floodlight to a large metal "break-out box" at the base of the light and other cables connected the box to the van outside. The Court in *Estes* noted that as a result "[c]ables and wires were snaked across the courtroom floor . . . ." *Id.* at 536, 553.[51]

A revolution in the technology of television camera equipment has occurred since *Estes*,[52] and the Florida

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[50] 381 U.S. at 553, *quoting* New York Times, Sept. 25, 1962, p. 46, col. 4.

[51] Not only studio but motion picture cameras were present at the *Estes* pretrial hearing and trial. *Id.* at 554. These motion picture cameras could be extremely distracting since moving parts rotated the film reel on the camera and made a substantial amount of noise.

[52] *See, e.g.*, Nishi, *Mini-Cameras*, in TELEVISION NEWSGATHERING (1976); PAULSON, ENG/FIELD PRODUCTION HANDBOOK (1976); *A Technological Strike at ABC*, BUSINESS WEEK, Aug. 8, 1977, at 67;

Supreme Court rule effectively requires that this modern equipment be utilized.[53] As noted above, the rule permits only one portable television camera in any trial court proceeding and permits it to be operated by only one person.[54] The Chief Judge of the judicial district must designate the location of the equipment and, once in place, it may not be moved during the proceeding. The rule also specifies that no additional lighting or movement of technicians supervising the equipment is to be permitted. No separate audio system is allowed; the audio system present in the courtroom must be utilized.[55]

Cameras meeting these requirements today are generally hand-held, transistorized, video tape electronic cameras that weigh only eighteen to twenty pounds and are about one-seventh the size of the old studio camera. Since these cameras are so much smaller and lighter than the cameras in use at the time of *Estes*, they can be mounted on far smaller tripods which occupy less than two square feet of floor space, or about 25 percent of the floor space required by the tripods used in *Estes*. These cameras are self-contained; the control unit, power supply and synchronization generator are all contained within the camera, thus eliminating the need for a large motor van. Moreover, these cameras can operate indoors without additional floodlights and their accompanying glare, heat and cables. The Florida rule also requires

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*More Versatility, Lower Costs for ENG Equipment*, BROADCASTING, April 4, 1977, at 82; Schneider, *One of These, Some of Those*, BROADCASTING, Oct. 25, 1976, at 47; *Little Cameras Make Big Splash at Convention*, BROADCASTING, Mar. 25, 1974, at 63; *Smaller is Better For CBS News*, BROADCASTING, Nov. 12, 1973, at 54.

[53] *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764, 792, Appendix 3.

[54] In addition, the rule permits only one still photographer with no more than two still cameras to be present. *Id.*

[55] *Id.*

the video tape recording equipment be located in a distribution room in the courthouse, thus eliminating any need for even a video tape recorder adjacent to the camera.[56]

Advances in lens technology enable a single camera today with a ten millimeter lens to cover almost a 180 degree surface, thus reducing the need for the substantial number of cameras present at the *Estes* pretrial and trial procedings. One camera, placed high and in a corner, now can record the events taking place in an entire courtroom.

As the opinions in *Estes* recognized, such changes in television equipment are constitutionally significant. 381 U.S. at 552, 595-96. Indeed, these changes strongly influenced the Florida Supreme Court in its decision to adopt a final rule permitting television cameras in the courtroom. Thus the court observed:

> "Technological advancements have so reduced size, noise, and light levels of the electronic equipment available that cameras can be employed in courtrooms unobstrusively." *In re Petition of Post-Newsweek Stations*, 370 So. 2d at 775.

And the Massachusetts Advisory Committee on Media Coverage of the Court recently concluded that the state court rule barring television from the courtroom was obsolete as a result of advances in technology:

> "The advent of modern communications equipment eliminates the need to ban such equipment from the courtroom. Still cameras no longer require flashes [and] small video cameras, without yards of obnoxious cables, can be strategically placed so as not to interfere with the proceedings . . . ." [57]

The court in *CBS, Inc.* v. *Lieberman*, 439 F. Supp. 862 (N.D. Ill. 1976), recognized that these significant

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[56] *Id.*

[57] *Report on the Advisability of Permitting Electronic Recording of Court Proceedings For News Purposes* (June 1, 1979).

changes in technology made television camera equipment no more disruptive of the trial process than the sketch artist's pencil and paper:

> "We recognize that today's television filming equipment is a far cry from that which was employed in *Estes*. As a result of contemporary technology, filming can be done with no additional lights. The videotape cameras are not much larger than a shoe box. They can be operated on standard 120 volt current. Indeed, they can be operated by a battery pack carried by the cameraman. Perhaps the day has arrived when equipment of this nature should be likened to pencil and paper and afforded the same protection as that extended to courtroom sketching." *Id.* at 867 (citation omitted).

Not only is the equipment less disruptive, but some experts believe that the presence of cameras can even enhance the decorum of the proceedings by diminishing the need for numerous reporters and sketch-artists inside and outside the courtroom.[58] The Brief Amici Curiae of the Florida News Interests provides a detailed discussion of this point. We suggest that whatever the disruptive effects of the television equipment present in *Estes*, a far different situation prevails today.

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[58] *See, e.g.*, Fretz, *Cameras in the Courtroom*, 14 TRIAL 28 (1978); Monroe, *The Case for Television in the Courtroom;* 21 FED. COMM. BAR J. 48 (1967); Tate, *Cameras in the Courtroom: Here to Stay*, 10 U. OF TOLEDO L. REV. 925 (1979); Weinstein and Zimmerman, *Let the People Observe Their Courts*, 61 JUDICATURE 156 (1977); Wilson, *Justice in Living Color: The Case for Courtroom Television*, 60 ABA J. 294, 295 (1974).

In justifying adoption of its rule permitting camera coverage of criminal trials, the Florida Supreme Court appeared to agree that allowing television coverage of criminal trials was less disruptive than the traditional out-of-court method of covering such trials. *In re Petition of Post-Newsweek Stations*, 370 So. 2d at 781.

### C. In View of the Public's Acceptance of Television Today, the Concerns Expressed in *Estes* as to the Adverse Psychological Impact of Television Coverage on Trial Participants Are No Longer Valid.

Appellants virtually concede in this Court that the equipment used for televising criminal trials is not intrusive.[59] However, they claim that the mere presence of cameras has an adverse psychological impact on trial participants, and that this was the basis for the *Estes* decision.[60] Notably, appellants make no effort whatsoever in their brief to show that the participants in this particular trial suffered any adverse psychological effects from the television coverage of the proceedings.[61]

Whatever potential adverse effects of television coverage of criminal trials were feared at the time of *Estes*—when television was in its infancy and intrusive equipment was required—the fears are no longer valid today.[62] Not only has the equipment changed; so has the public's familiarity with television. In 1965, television was a novel medium; today a television set is an accepted part of everyday life in virtually every American home. Indeed, most households now have two television sets,[63] and they are watched on the average more than six and one half-hours each day.[64]

The revolution in camera technology has freed television news from the confines of the studio, and events

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[59] App. Br. at 38.

[60] *Id.*

[61] *Id.* at 27-32.

[62] Indeed, as the Joint Brief for Amici Curiae Radio Television News Directors' Association *et al.* discusses in detail, an increasing number of states, apparently recognizing this, have permitted some form of televising of criminal trials.

[63] A.C. Nielsen Co., TELEVISION AUDIENCE (1979).

[64] A.C. Nielsen Co., NIELSEN TELEVISION INDEX (NTI) (Jan. 1980).

which previously were covered only rarely because of the cumbersome nature of studio cameras and the extraordinary expense and inconvenience of film, today receive routine coverage by cameras reflecting the new technology. As a result, television cameras are present at numerous events of general public interest.[65] And, in marked contrast to the situation which existed at the time of *Estes*, the public now accepts television cameras almost without notice.

Television coverage of official public proceedings has also become commonplace. Florida's "Sunshine Law" is one of the most sweeping in the nation.[66] Florida citizens find cameras at meetings of administrative agencies, school boards and county commissions, city councils, legislative deliberations and other events of public debate.[67] Florida citizens have been exposed to television cameras when they testify at zoning hearings, appear before school boards, petition for changes in county ordinances or petition the state cabinet.[68] Even religious services are televised. And television coverage of all of these proceedings is accomplished without interfering with the solemnity and dignity of the occasion.[69]

Despite the hypothetical concerns of Justice Clark in *Estes* as to the adverse effects of television coverage of

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[65] *See* PAULSON, ENG/FIELD PRODUCTION HANDBOOK (1976), §§ 2.14-2.15, 3.7.

[66] *See* Fla. Stat. § 286.011; *Canney* v. *Board of Pub. Instruction*, 278 So. 2d 260 (Fla. 1973).

[67] *See* LeRoy, Wotring and Lyle, *Today in the Legislature—the Florida Story*, 24 J. COMMUNICATION 92 (1974).

[68] *See* statement by Don MacCullough, Director of Educational Media Program for Dade County, Report of Post-Newsweek Stations, *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764 (1979), Appendix at 41.

[69] *See, e.g.*, Commentary, Canon 3A(7), Alabama Canons of Judicial Ethics.

trials on judges and lawyers, 381 U.S. at 548-49, trial judges and lawyers in Florida as well as other states have reported favorably on the use of television in courtrooms.[70] A survey conducted by the Office of the State Court Administration for the Florida Supreme Court and referred to in the Florida Supreme Court decision to adopt a final rule permitting cameras indicates that trial participants' perception of the judiciary and the dignity of the courtroom are not adversely affected by the fact that the proceeding is televised.[71] Moreover, although participants are aware of the presence of television cameras in the courtroom, the cameras have almost no effect on them.[72] In addition, jurors are not concerned that persons outside the courtroom will attempt to influence their decision more because the trial is televised and not simply reported in the newspapers.[73] In other states as well, assessments made by trial participants who have been televised, including attorneys, jurors, witnesses and judges, reveal that the presence of television cameras has not caused any adverse psychological effects.[74]

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[70] *See In re Petition of Post-Newsweek Stations*, 370 So. 2d 764, 769-70.

[71] *Id.* at 768.

[72] *Id.*

[73] *Id.* at 769.

[74] *See, e.g., Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom* (April 1, 1979 (Wisconsin)); *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 65 (Colo. 1956); Goldman and Larson, *News Camera in the Courtroom During State* v. *Solorzano: End to the Estes Mandate?*, 10 SOUTHWESTERN L. REV. 2001 (1978) (Nevada).

Other evaluations and reports are included in the Report of Post-Newsweek Stations, *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764. *See also* evaluations contained in Note, *Lights, Camera, Action: This Court is Now in Session*, 14 GONZAGA L. REV. 623, 632 (1979).

Appellants' suggestion that this Court should presume the existence of adverse psychological effects is accordingly unwarranted and untenable.

## CONCLUSION

For the reasons stated above, the judgment of the Florida Supreme Court should be affirmed.

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# In the Supreme Court of the United States

**October Term, 1979**

NOEL CHANDLER and ROBERT GRANGER,
*Appellants,*

vs.

THE STATE OF FLORIDA,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

## BRIEF OF COMMUNITY TELEVISION FOUNDATION OF SOUTH FLORIDA, INC., THE PUBLIC BROADCASTING SERVICE, THE FLORIDA PUBLIC BROADCASTING SERVICE, INC., AND THE EDUCATIONAL BROADCASTING CORPORATION AS AMICI CURIAE

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## INTEREST OF THE AMICI

Public television was created to serve the needs of the American people, and its informing vision has been to meet those needs by providing programming of great social value. Public television has nowhere been more successful in pursuing this vision than with its coverage of America's courtrooms. Its broadcasts of judicial proceedings have advanced the constitutional guarantees of a fair and public trial before one's peers, as well as freedom of the press.

In *Richmond Newspapers, Inc., et al. v. Commonwealth of Virginia, et al.*, 48 U.S.L.W. 5008, at 5012 ("*Richmond News*"), this Court held the public and press enjoy a First Amendment right of access to criminal trials and recognized that "to work effectively, it is important that society's criminal process satisfy the appearance of justice, [citation] and the appearance of justice can best be provided by allowing people to observe it."[1] In today's society people simply cannot attend judicial proceedings in any appreciable numbers; they have long needed a technological surrogate for personal attendance which would facilitate direct observation of the courts.

Public television is uniquely suited to serve as that surrogate. Unfettered by commercial restraints public television can devote, and has devoted, the broadcast time necessary for Americans to observe directly their judicial process. Public television broadcasts of judicial proceedings, often in their entirety and necessarily in context, provide perhaps the only opportunity millions of Americans will have to observe the judicial process.

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1. Many other important goals are served by public television broadcasts of judicial proceedings. See Argument, II.B., *infra*.

*Amici curiae* Community Television Foundation of South Florida, Inc. (WPBT "Channel 2"), the Public Broadcasting Service ("PBS"), the Florida Public Broadcasting Service, Inc. ("FPBS"), and the Educational Broadcasting Corporation (WNET/Thirteen)[2] have provided programming featuring live and tape coverage of complete courtroom proceedings "elevat[ing] the level of public debate and understanding of our ever more complex local, state, and national activities. . . ."[3]

The public television amici support the state of Florida in this appeal because the *qualified access* granted by Canon 3A(7) is a crucial step toward the attainment of important social goals they were created to serve, taken without compromise of Sixth Amendment rights.

## SUMMARY OF ARGUMENT

### I.

When in 1965 this Court decided *Estes v. Texas*, 381 U.S. 532 (1965) (*"Estes"*), public television was in its infancy; today it reaches approximately 52 million American

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2. All collectively referred to hereinafter as "the public television amici". WPBT Channel 2 is a public television station for South Florida. PBS is a non-profit membership corporation whose members are most of the public television licensees throughout the United States and its territories. PBS operates a satellite-connected system for distribution of programs to the approximately 288 public television stations across the nation. PBS also provides its member stations with a broad range of support services in such areas as promotion, program development, research, and fund-raising. FPBS is a non-profit corporation in the State of Florida. FPBS provides leadership to the public broadcasting medium in the State and is the formal instrument for regular consultation among its member licensees, aimed at cooperative activities resulting in increased operational efficiency and decreased costs, with the express goal of improving and enhancing the services rendered by its member licensees to the public. WNET Channel 13 is a public television station in New York City.

3. A PUBLIC TRUST: THE REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING 31 (1979) (hereinafter "A PUBLIC TRUST").

households each month. THE PUBLIC TELEVISION AUDIENCE (PBS, May 1980) (Appendix page 1, hereinafter "App."). Over the past 15 years public television has achieved a distinguished record of providing diverse and culturally significant programming to local communities, with a concomitant growth in the public's trust in public television. The value of its contribution to informed public debate on the critical social and political issues of our time is unquestioned. Whether it be coverage of trials, appellate arguments, or, indeed, "gavel-to-gavel" coverage of the Watergate or other Congressional inquiries, public television's participation has enabled the public to see and understand this country's system of law and its legal proceedings.

The central goals of public television have been to act "as a force in the public interest, a display case for the best of America's creative arts, a forum for public debate - advancing the democratic conversation and enhancing the public imagination." A PUBLIC TRUST, *supra,* at 22. Appellants here seek to muffle the democratic conversation and stifle the special voice of public television by the institution of a virtual ban on camera coverage of the judiciary, undoubtedly one of the most significant government institutions in our lives. Public television's special interest in enabling the American public to see, study, and thereby understand this most important of institutions should not be denied.

The development and growth of public television has helped transform the public's perception of television as a communications medium. Today television is regarded by a majority of Americans as the most credible communications medium. Whether the perception of television held by some members of the *Estes* Court was correct in 1965 is not at issue. It is the perception of television held

by the American public today that is determinative. This appeal must be considered in that context.

## II.

Florida's present Canon 3A(7) permits camera coverage of judicial proceedings where the presiding judge finds such coverage (i) would not cause disruption of the proceedings, (ii) preserves courtroom decorum, and (iii) would not compromise the fair trial rights of the accused. Canon 3A(7), as so modified, has helped public television to achieve its goal of in-depth reporting of public affairs. Public television has been the principal broadcaster of judicial proceedings in Florida, and no one could reasonably assert that its full and fair coverage of a wide range of judicial proceedings has violated anyone's rights or disturbed courtroom proceedings. Appellants' inflammatory adjectives and adverbs misrepresent public television's clear record, set out *infra*.[4]

The distinguished record of public television coverage of judicial proceedings in Florida demonstrates Canon 3A(7) promotes many of the important constitutional and social values of public trials identified in *Richmond News*.

Television allows people to see and hear for themselves what transpires in the courtroom. The distinctive contribution of public television's broadcasts of judicial proceedings in their entirety is that such coverage directly *communicates the judicial process* to the public; ordinary coverage communicates only the *results of that process*.

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4. Appellants, of course, do not make reference to any specific instance in which public television's coverage of judicial proceedings actually has prejudiced their fair trial rights or those of any other accused.

Only through cameras in the courtroom can the public observe how the trial process works, how testimony is taken, how the rules of evidence function, what roles the participants play, the demeanor of the defendant and witnesses, the quality of the attorneys, and the other existential aspects of the proceedings.

It is most fundamentally the right to observe judicial proceedings that *Richmond News* recognized. Physical presence in the courtroom is unnecessary if the means of seeing and hearing the proceeding are otherwise secure. Public television in Florida does so by broadcasting trials, hearings, and appellate arguments in their entirety. The resultant public observation of the judicial system serves many public interests including (i) the promotion of free discussion of governmental affairs; (ii) fostering of confidence in the system; (iii) implementation of the public's right to know what is happening in the system; (iv) the checking of corrupt practices within the system; (v) improvement in the quality of bench and bar; (vi) protection of the accused from injustice; and (vii) serving as the vehicle by which members of the public may experience a "prophylactic" sense of participation in the system. In certain respects television coverage of trials may be the only effective means of realizing these values.

## III.

Revised Canon 3A(7) serves a variety of compelling state purposes, but most importantly Florida's fundamental commitment to open government. The important public interests derived from government open to the people are well within the proper scope of Florida's sovereignty and "police power". Familiar principles of federalism preclude this Court's interference with this fundamental state process.

Revised Canon 3A(7) grants only a qualified right of access and prohibits any coverage interfering with Sixth Amendment interests. In this regard it is important to note Appellants' central argument is the *factual* contention that camera coverage has an inescapable psychological impact on trial participants such that a fair trial cannot be had whenever cameras are present. Yet no *facts* are presented to support this contention.

*Estes*, properly construed, is consistent with electronic camera coverage in the courtroom because television has evolved into a mature and highly credible communications medium. The television camera's routine use in security systems, banking transactions, teaching, recreation and information gathering has accustomed the public to its presence. Television technology has so advanced that small hand-held cameras can silently monitor judicial proceedings at normal light levels. Many states have accepted the implicit invitation of *Estes* to experiment with camera coverage as technology improves; today more than half the states permit coverage on some basis. These dramatic changes over the past 15 years make the concerns of the *Estes* plurality constitutionally irrelevant and show the propriety of Florida's constitutional right to adopt revised Canon 3A(7).

## IV.

Since camera coverage of trials is a "most effective means" of implementing the First Amendment right of the public to observe criminal trials recognized in *Richmond News*, Florida's Canon 3A(7) is a reasonable "time, place and manner" restriction on this right.

Appellants would have this Court substitute an absolute right of the accused to exclude cameras for Florida's reasonable "time, place and manner" restriction. Such an

absolute ban would directly abrogate First Amendment rights (i) by infringing the right of the public to observe trials absent an overriding interest in closure specifically articulated by the trial court, *Richmond News*, at 5025; (ii) by drastically reducing public television coverage of the courts, thereby "limiting the store of information from which members of the public may draw", *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); (iii) by drastically reducing the number of people who may observe the courts, *Buckley v. Valeo*, 424 U.S. 1 (1976); and (iv) by discriminating against a medium of communication which may be the "most effective means" of implementing the right to observe trials, without any showing that both a compelling interest justifies such discrimination and that adequate alternative communication channels exist, *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977).

## ARGUMENT

### I. THE INFORMING VISION OF PUBLIC TELEVISION IS TO PROVIDE LOCAL COMMUNITIES ACCESS TO EVENTS, INFORMATION, AND PROGRAMMING OF GREAT SOCIAL VALUE

#### A. - Public Television Was Conceived To Meet The Need Of Local Communities For Programming Of Great Social Value

##### 1. The Creation Of Public Television

The 1934 Communications Act did not provide for "non-commercial" broadcasting. Not until 1952 "[a]fter great pressure by educational and public groups . . ." did the Federal Communications Commission agree to reserve

some 242 channels for non-commercial television. A PUBLIC TRUST, *supra*, at 33. The pressure for non-commercial television stations broadcasting quality programming of interest to all groups within the local community continued to increase through the years,[5] and by 1979 some 655 channels had been reserved for non-commercial television. *Id.*

Non-commercial television prior to 1965 was broadcast primarily by educational institutions, and not until a substantial demand for educational television developed were non-profit community organizations established to obtain licenses. Funding in those pioneer days was scarce and primarily secured from private contributions, auctions, and foundation support. In 1962 Congress commenced some financial support to educational television. But even that support was limited to $32 million over a five-year period. *Id.* at 34. By the time of *Estes*, educational television was still in its infancy.[6] In 1966 there were

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5. As the Carnegie Report observed:

> Unlike commercial radio and television, most print media, and many new communications services, public broadcasting creates programs primarily to serve the needs of audiences, not to sell products or to meet demands of the marketplace. This ideal demands that public television and radio attract viewers and listeners whose tastes and interests are significant, but neglected or overlooked by media requiring mass audiences. The noncommercial nature of public broadcasting has important implications for its programs, its relations with creative talent, and its mission to unserved audiences.

A PUBLIC TRUST, *supra*, at 25.

6. For example, the budget for Channel 2 in 1966 was $174,000. and its paid membership was less than 6,000. Today, its budget is over $5,000,000. and its paid membership exceeds 52,000 families and individuals. REPORT OF COMMUNITY TELEVISION FOUNDATION OF SOUTH FLORIDA, INC. (WPBT-TV), at 11, filed July 31, 1978 with the Florida Supreme Court pursuant to *In Re Petition of Post-Newsweek Stations, Florida, Inc.*, 347 So.2d 404 (Fla. 1977) (hereinafter "COMMUNITY TELEVISION REPORT").

only 126 struggling educational television stations in the United States; by 1978 there were about 280 public television stations, most of them well financed and managed. A PUBLIC TRUST, *supra,* at 34, 224.

The importance of *public television* was recognized with the creation in 1965 of the Carnegie Commission On Educational Television and its Report two years later. Partially in response to the Carnegie Report, Congress passed the Public Broadcasting Act of 1967, 47 U.S.C. §396 (1967), to provide financial assistance to public television. This Act established an independent Corporation for Public Broadcasting ("CPB") to disburse federally appropriated monies to support public television stations and to finance program development free of governmental interference with public television's content.[7] CPB and the public television stations organized PBS to operate the interconnection for public television stations and to facilitate programming for national distribution. PBS programming and distribution activities began in the fall of 1970. A PUBLIC TRUST, *supra* at 38-39. As a consequence of its unique position, PBS came to occupy a crucial role within the public television system. It provided, as well, additional insulation from government control over programming.

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7. One of the important goals Congress sought to achieve in creating the CPB was that:

> . . . a private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.

47 U.S.C. Section 396 (1967).

### 2. The Increase In Funding

Total annual income to public television stations from all sources increased from $58 million in 1965 to $158 million in 1972 and reached approximately $417 million by 1977, the year the Florida Supreme Court decided to initiate the experimental program. A PUBLIC TRUST, *supra,* at 39, 341. This extraordinary financial growth partly reflected an increase in the annual federal support from an average of $6.5 million during the *Estes* period to over $113 million in 1977. *Id.* at 42, 341. But non-federal funding, which constitutes over 70% of public television income, had by 1977 risen to more than $302 million per year. Thus, public broadcasting is primarily funded by state and local communities and viewers, not the federal government.[8] Most important, it is not funded by advertising, but directly or indirectly by the public who watch it.

### 3. The Growth In Audience

Concomitant with the extraordinary growth in public television's funding has come a remarkable increase in the number of its viewers.[9] By May 1980 public television was reaching 52 million households (68.2% of all households) each month, and families viewing public television were watching it about 9 hours and 25 minutes per month. The public television audience increased 39% from

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8. Local government 7.3%; state government 22.8%; state colleges 8.6%; other colleges .9%; foundations 5.2%; business 9.1%; public television subscribers 10.4%; auctions 3.0%; all others 4.9%; federal government 27.3%. *Id.* at 341.

9. Between 1970 and 1972 alone the total prime-time public television audience increased more than 30%. *Id.* at 40. From 1966 to 1977 the average length of a public television broadcast day increased from 8 hours to 14 hours; subscription income increased 335% from 1972 to 1977; and the number of Americans viewing public television at least once a month increased by 28% between 1973 and 1977, to 63% of all households. *Id.* at 53.

1975 to 1980 and the monthly "prime time" audience increased by 55% over this same period. THE PUBLIC TELEVISION AUDIENCE (App. 1).[10] As the Carnegie Commission stated in 1979:

> . . . public broadcasting has managed to establish itself as a national treasure. From the backwaters of an industry long dominated by commercial advertising, the public system has come into its own. Millions now watch and hear, applaud, and criticize a unique public institution which daily enters their homes with programs that inform, engage, enlighten, and delight. In that sense, the ideal has been realized: public broadcasting has made a difference.

A PUBLIC TRUST, *supra*, at 9. Public television in its use of cameras in Florida courtrooms has worked through "pooling" arrangements with news teams from commercial television—that element of commercial broadcasting with a uniform tradition of excellence—to once again prove itself a "unique public institution".

Americans now watch television for "nearly 6 1/2 hours per day in the average household," A PUBLIC TRUST, *supra*, at 21, and a majority of Americans regard television as their primary, and most credible, source for news.[11] Thus, television, and public attitudes towards it, have dramatically changed since *Estes*. The achievements of public television during this era have been sub-

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10. While the average commercial network's cumulative weekly rating was 90.3 compared to public television's 33, public television's monthly cumulative audience was about 63.2 by 1978. A PUBLIC TRUST, *supra*, at 15, 330; PUBLIC TELEVISION AT 1980 . . . IN THE FOREFRONT (PBS, January 1980) (App. 10).

11. Roper, PUBLIC PERCEPTIONS OF TELEVISION AND OTHER MASS MEDIA (1979); Roper, CHANGING PUBLIC ATTITUDES TOWARDS TELEVISION AND OTHER MASS MEDIA 1959-1976 3 (1977).

stantial, and they—together with the news reporting of commercial stations—have helped to transform the role of television in contemporary society from a too lightly regarded "entertainment" medium to its position today as the primary source of the public's information and culture.

### B. Public Television Has Attained A Distinguished Record Of Providing Socially Important Programming To A Substantial Audience In Local Communities Throughout The United States

Public television's programming achievements have been remarkable both in quality and diversity, illuminating science and the physical world around us,[12] celebrating literature and the performing arts,[13] and offering path-breaking contributions to children's television.[14]

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12. Such programming has included *The Ascent of Man; Einstein's Universe; Connections;* a fascinating series of National Geographic programs: the *Incredible Machine,* the *Living Sands of Namid,* the *Great Whales,* the *Mysteries of the Mind,* the *Dive to the Edge of Creation,* the *Legacy of L.S.B. Leaky, The Volga,* and the *Great Apes;* numerous installments of *NOVA;* and underwater explorations with Jacques Cousteau (App. 3, 12-19).

13. In recent years the widely acclaimed Masterpiece Theatre has brought local communities *Disraeli; Poldark I and II;* and *I, Claudius.* Public television placed its cameras inside the famed Metropolitan Opera House for a live full-length performance of the epic opera, *La Boheme,* and has regularly broadcast the nation's finest concerts in series such as *In Performance at Wolftrap,* and more recently, *Live From The Met.* In the Spring of 1979 *The Scarlet Letter* was watched in over 10 million American homes, as was *Live From The Grand Ole Opry* in March 1979. Programs like *The Pallisers,* based on Flaubert's dramatic chronicles and Ingmar Bergman's *Scenes From A Marriage* bring the work of creative artists to local communities throughout the United States, a feat regularly performed in such series as *Visions; Classic Theatre: The Humanities In Drama;* and *The American Short Story* (App. 3, 12-19).

14. Public television has given American children *Sesame Street; The Electric Company; The Best of Families; Once Upon A Classic; Zoom; Mr. Roger's Neighborhood; Que Pasa; Villa Alegre* and *Rebop* (App. 3, 12-19).

As important as these achievements have been, of equal significance has been public television's commitment to in-depth programming analyzing contemporary public affairs. Among the outstanding public affairs programs of recent years have been *The MacNeil/Lehrer Report; Washington Week In Review; Wall Street Week; Firing Line; Ben Wattenberg's 1980; Bill Moyers Journal;* and many special documentary studies of topics of contemporary national and international concern.[15]

Last year public television received no less than 50 national awards and honors.[16] The informing vision of public television is to provide the American public programming of great social value. Cameras in the courtroom must be viewed as part of that vision.

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15. *The Turned-On Crisis* (study of the American drug problem); *The Killers* (study of leading causes of death in America); *Juvenile Court* (study of the juvenile justice system in America); *Drink, Drank, Drunk* (alcoholism); *The Thin Edge* (mental illness); *Harlem: Voices and Faces* (ghetto life); *Why Me?* (breast cancer); the *Senate Select Hearings on the CIA; Welfare* (the welfare state); *Since The American Way Of Death* (high cost of dying); *Presidential Forums, Ford/Carter Debates,* and *U.S.A.: People and Politics* (the 1976 national elections); the *Cabinet Confirmation Hearings In The Senate; California Reich* (neo-nazism); *Canal Zone* (the Panama Canal); *Global Paper* (world hunger); and in 1979 alone *Paul Jacobs And The Nuclear Gang; The Energy War; Palestine; Rizzo; Black Man's Land; Sinai Field Mission, The Japanese; Mr. Speaker: A Portrait of Tip O'Neill; An Act of Congress;* and many more (App. 3, 12-19).

16. PUBLIC TELEVISION AT 1980 . . . IN THE FOREFRONT (App. 18).

## II. PUBLIC TELEVISION HAS BEEN A PRINCIPAL BROADCASTER OF JUDICIAL PROCEEDINGS BECAUSE SUCH PROGRAMMING IS OF GREAT SOCIAL VALUE TO LOCAL COMMUNITIES IN FLORIDA AND ELSEWHERE

### A. Public Television Has Devoted Substantial Broadcast Time And Reached An Extensive Audience Under Florida's Cameras-In-The-Courtroom Program

Public television was a principal broadcaster of judicial proceedings during the experimental program and continues to be under revised Canon 3A(7). Its extensive coverage of the Florida courts has been serious and socially responsible, and the effects of that coverage wholly positive.

#### 1. Channel 2's Activity Under The Experimental Program

During the experimental program Channel 2 broadcast 85 hours of courtroom coverage. COMMUNITY TELEVISION REPORT, *supra,* at 15. This coverage was in addition to its regular news coverage of the judicial system, and included "gavel-to-gavel" coverage of *Florida v. Zamora*[17] and *Florida v. Herman*;[18] nightly excerpts of Florida Senate Judiciary-Civil Committee Hearings on ethics charges against Dade County State Senator Ralph Poston; several complete sentencing hearings; a complete appellate

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17. Case No. 77-25123A (Fla. 11th Cir. Ct. 1977), *aff'd* 361 So.2d 776 (Fla. 3rd DCA 1978). The trial was for the murder of an 83 year old woman by her 15 year old neighbor. His unique defense was that television programming had "caused" him to commit the crime.

18. Case No. 76-1534-CF (Fla. 15th Cir. Ct. 1977).

oral argument; and excerpts of a major insurance fraud trial. These proceedings could not have been broadcast without the experimental program. COMMUNITY TELEVISION REPORT, *supra*, at Appendix A.

This coverage bears no resemblance to the caricature presented in Appellants' brief. Channel 2's broadcast of 27 hours of the *Zamora* trial and almost 42 hours of the *Herman* trial constituted essentially all the "public" portions of those trials.[19] Approximately 8 hours of the Senate Judiciary hearings and 3-1/2 hours of the auto insurance fraud trial were broadcast. The appellate arguments and the sentencing hearings were broadcast in their entirety. COMMUNITY TELEVISION REPORT, *supra*, at 15-22. The proceedings were carefully presented in context, and in an unsensational manner:

> Extensive coverage of criminal trials included not only the most important portions of the trials, but also the slow, step-by-step process of refining the legal issues for consideration by the jury.

COMMUNITY TELEVISION REPORT, *supra*, at 15. Thus, public understanding of the criminal justice system was facilitated.

> Fast zooms and pans with the camera were avoided so as not to "dramatize" the trials. Although the broadcasts included a background of the case and definitions of legal terminology, viewers were told they were not seeing the entire trial, and that it would be impossible for them to determine the guilt or innocence of the accused.

*Id.* This was no "trial by television".

The televised cases "were chosen for coverage either for their newsworthiness or because they had special edu-

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19. COMMUNITY TELEVISION REPORT, *supra*, at Appendix A.

cational value." *Id.* Thus the *Zamora* case was selected by Channel 2 for full coverage because: (i) it was the first major trial in Dade County after commencement of the experimental program; (ii) crime against the elderly was, and is, a matter of widespread public concern; and (iii) the legal defense presented raised important questions of public policy. The *Herman* trial was widely considered to be one of the more significant recent cases in the Palm Beach area.

Public television's coverage of the *Zamora* and *Herman* trials had no discernible negative effect on the trial process:

> WPBT provided a pool camera, and other broadcast media were free to record or broadcast live any portions of the coverage. Videotape recorders were set up in a special conference room, and many of the eighty press representatives viewed the trial over the remote monitors. A court liaison [was appointed] to help solve any logistical problems.
>
> . . .
>
> Virtually all participants in both the *Zamora* and *Herman* trials stated that presence of television was not disruptive or distracting. . . . A survey conducted by Florida Technological University of the trial participants in the *Herman* trial confirmed the comments received by WPBT that the presence of television does not disrupt trial proceedings.

COMMUNITY TELEVISION REPORT, *supra*, at 18, 19.

The viewing audience was substantial, and the overwhelming reaction of the public was that it had learned much from the broadcasts.[20]

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20. Both trials were viewed by extensive public television audiences: 75,000 to 125,000 people in the Miami area watched the nightly programs on the *Zamora* trial while

*(Continued on following page)*

Furthermore, the resulting trial tapes have had educational usage:

> The *Zamora* broadcast formed the basis of a documentary, "TV on Trial", that was broadcast nationally on May 23, 1978. In addition, excerpts of the trial were broadcast by the Canadian Broadcasting Corporation, the British Broadcasting Corporation and a Dutch television network.
>
> . . . [C]ountless inquiries [have been] received by WPBT since the broadcast of the *Zamora* trial from law schools, universities, high schools, attorneys, judges and news organizations around the country. . . .

*Id.* at 20.

Channel 2 "received widespread praise for the manner in which it conducted courtroom coverage", and the Florida Bar's highest honor for media coverage. *Id.* at 21.

The trial judges who handled the *Zamora* and *Herman* cases (the latter an outspoken opponent of cameras-in-the-courtroom), and all other judges with such extensive experience, reported no adverse impacts from television coverage. As the *Herman* trial judge grudgingly admitted, "There were no histrionics and no thespians. . . . The attorneys, witnesses and all interested parties were properly behaved. . . . [T]he experiment of fully televising the *Herman* trial worked out much better than the court believed possible." *Id.* at 10. *See* Sholtz, *"Florida v. Her-*

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Footnote continued—

> the *Herman* audience varied between 30,000 and 66,000. Viewer response was overwhelmingly positive. 97% of the approximately 2,500 calls and letters received by WPBT during coverage of the *Zamora* trial were favorable. Approximately two-thirds of the calls and letters received during the *Herman* trial were also favorable, and most of the objections were from viewers complaining about the pre-emption of regularly scheduled programming.

*Id.* at 20.

*man*: Report To The Supreme Court Of Florida Re: Conduct Of Audio-Visual Trial Coverage", at 14-15.[21]

As Judge R.A. Green stated in his report to the Florida Supreme Court:

> During the past years, I have had occasion to sit in hearings and trials during which cameras and electronic media were in the courtroom. Whether we are speaking of still photographers for newspapers, electronic tape recording for use on radio news, or television cameras for use for any purpose in television, I have had not one untoward experience.

R.A. Green, "Response of One Judge of Trial Jurisdiction Pursuant to Invitation" (July 21, 1980).

### 2. Channel 2's Activity Under Revised Canon 3A(7)

Since the adoption of Canon 3A(7), Channel 2's principal courtroom coverage has been its broadcast of *Florida v. Jones,* the prosecution of the black superintendent of the Dade County school system, now the fifth largest system in the country. Full coverage was, again, the approach with 40 hours of coverage (virtually the entire "public" portion of the trial) broadcast to the community. Again the response was overwhelmingly favorable.[22]

### 3. Broadcast Activity Of The Florida Public Television Stations

Other public television stations in Florida have been extremely active in bringing the public a broad spectrum

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21. For the *Zamora* trial judge's favorable report, *see* Baker, "Report To The Supreme Court Of Florida Re: Conduct Of Audio-Visual Trial Coverage"; Baker, "*Florida v. Zamora*: Report To The Supreme Court Of Florida Re: Conduct Of Audio-Visual Trial Coverage".

22. Memorandum Re: Cameras In The Courtroom (Channel 2, July 18, 1980) (App. 4).

of judicial proceedings. The Florida Public Broadcasting Network has aired oral arguments in the Florida Supreme Court involving the death penalty, the safe driver incentive plan, and the Florida Environmental and Land Management Act; proceedings relating to the constitutional revision of Merit Retention and the Commissions on Appellate Court Structure and on Florida Supreme Court Jurisdiction; clemency hearings; a significant state land-use case; and, from July 29 through July 31, 1979, WFSU (Tallahassee) broadcast 11 hours of coverage of *State v. Theodore Bundy* (App. 6-8).

### B. Broadcast Activity Of Public Television Around The Country

Public television stations around the country have broadcast judicial proceedings in depth or in their entirety, where state law has permitted it. For example, in April 1980, WNET/Thirteen arranged for the coverage and the broadcast of one day's proceedings before the New York Court of Appeals. The resultant program, *Three Appeals,* has been shown not only in New York, and over public television stations nationally, but by bar associations and educational institutions. Citing this program, new court rules ending New York's absolute ban on cameras in the courtroom are being drafted by New York's administrative judge at the request of the Chief Judge of the New York Court of Appeals. While no formal survey has been made, some of the more recent highlights of other such coverage, which are matters of public record, include the gavel-to-gavel coverage of the three-week trial of the President of the City Council for Cleveland, Ohio by WVIZ, Cleveland; the broadcast by WMVT, Milwaukee of a judicial misconduct hearing held on June 27, 1980 before the State Supreme Court and a two-week murder trial in December 1978; coverage by WNEO and WEAO, Ohio, of the indictment and trial from June 9 through June 13, 1980, of a county judge for corrupt

practices; the broadcast by WWVU, West Virginia on October 4, 1979 of a 90-minute special on the juvenile justice system broadcasting substantial segments of juvenile proceedings. And on July 24, 1980, KAKM, Anchorage, began "gavel-to-gavel" coverage of State Supreme Court proceedings.

### C. Public Television's Broadcast Coverage Of Judicial Proceedings Is Programming Of Great Social Value

Public television coverage of Florida judicial proceedings permits the people to observe their courts in action. The many socially important interests advanced by such observation have been identified by this Court in numerous decisions:

(1) Public access to the courts promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. *Richmond News,* at 5012-14; *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 838-840 (1978); *Mills v. Alabama,* 384 U.S. 214 (1966). In *Richmond News* this Court acknowledged the crucial role of the electronic media in effectuating the public's right to attend trials:

> With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. . . . Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. [M]edia representatives . . . "contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ."

*Richmond News,* at 5012-5013; *Id.* at 5014 n. 12. To the same effect, *see Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-2 (1975).

(2) Such public access gives "the assurance that the proceedings were conducted fairly to all concerned". *Richmond News,* at 5012. This Court acknowledged the "nexus between openness, fairness, and the perception of fairness" and that "the means used to achieve justice must have the support derived from public acceptance of both the process and its results". *Id.*

(3) Aside from any beneficial consequences which flow from having open courts, the people have a right to know what occurs in their courts. This Court has noted that "a trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney,* 331 U.S. 367, 373, 374 (1947), and cases collected in *Richmond News,* at 5013 n. 9.

(4) Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny. *Richmond News,* at 5012; *Nebraska Press Asso. v. Stuart,* 427 U.S. 539, 559-60 (1976); *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975); *Sheppard v. Maxwell,* 384 U.S. 333 (1966).

(5) Public access protects the right of the accused to a fair trial. *Richmond News; Gannett Co. v. DePasquale,* 443 U.S. 368 (1979). Appellants argue television access inherently violates the Sixth Amendment rights of the accused. The reverse is true. The fair trial interests served by open judicial proceedings are enhanced by public television coverage because reaching the larger audience with visual coverage of complete trials increases the chance new witnesses might come forward and perjury and other misconduct will be deterred. *See Richmond News,* at 5012 *et*

*seq.* There is no evidence television coverage has any negative impact on Sixth Amendment rights (*see* Argument III, *infra*).

(6) Because lawyers, witnesses, and judges who participate know their conduct will be subject to public scrutiny, it is fair to conclude they will be more conscientious in the performance of their roles. In *Richmond News,* this Court noted no less an authority than Jeremy Bentham had concluded "that open proceedings enhanced the performance of all involved." *Id.* at 5012 n. 7.

(7) Finally, in *Richmond News* this Court found public access served a great "therapeutic" or "prophylactic" purpose by providing an "outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful self-help. . . ." *Richmond News,* at 5012. Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings,* 91 HARV.L.REV. 1899, 1906-1909 (1978).

Appellants would have this Court constitutionally limit television to secondhand reporting of judicial proceedings. But such coverage can report only the *results of judicial proceedings,* while camera coverage of the courtroom advances the foregoing interests by communicating *the judicial process itself.* Public television's coverage of trials, hearings and other proceedings, in their entirety, enables the public to observe how the trial process works, what functions the participants serve, and how well they serve them. Public television's coverage in Florida under the experimental program and revised Canon 3A(7) has been geared *to explain, as well as report, the trial process.* The demeanor and intonations of the witnesses, the compe-

tency of the lawyers and the judge, and the mechanics of the rules of evidence are all communicated.

Without cameras, information as to how the process works can be conveyed to the public only by personal attendance in court. If understanding is the object of communication, then there is no alternative channel of communication which can adequately replace television coverage of the courtroom.

Finally, public television is the only means for achieving the "prophylactic effect" of participation in the ritual of public justice. *See Richmond News*, at 5012.

## III. FLORIDA'S ADOPTION OF CANON 3A(7) IS A PROPER EXERCISE OF THE POLICE POWER AND CONSISTENT WITH SOUND PRINCIPLES OF FEDERALISM

### A. The Adoption Of Canon 3A(7) Is An Integral Element Of Florida's Broad Commitment To "Open Government"

The Florida Supreme Court modified Canon 3A(7) only after an exhaustive study and a year-long experimental program had been conducted.[23] Its action is an integral element of Florida's continuing commitment to government open to the people. Pursuant to this commitment the Florida Legislature has enacted expansive public records,[24] open meetings,[25] and financial disclosure[26] laws. These broad statutes have been construed liberally in favor

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23. *In Re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979).

24. Chapter 119 Fla.Stat. (1979).

25. Section 286.011 Fla.Stat. (1979).

26. Sections 112.313, 112.3141, 112.3143, 112.3145, 112.3146 Fla.Stat. (1979).

of disclosure by Florida's judiciary[27] and interpreted generously by the Executive Branch of the State government.[28] The people of Florida have enacted Constitutional "sunshine" provisions,[29] and the proceedings of both the executive and legislative branches are covered by television cameras.[30]

Because of Florida's strict Separation of Powers doctrine, opening the judicial system to public scrutiny has been left to the Florida Supreme Court. That Court has enacted more stringent financial disclosure requirements for the judiciary than were enacted by the legislature[31] and has opened Florida judicial proceedings to the public.[32]

As the Supreme Court explicitly stated, Canon 3A(7) is a "sunshine law" for the Florida judiciary, enacted to secure the welfare of the people of Florida:

> The prime motivating consideration prompting our conclusion [to revise Canon 3A(7)] is this state's commitment to open government.

*In Re Petition of Post-Newsweek Stations, Florida, Inc., supra,* at 370 So.2d 780. The Court noted fears comparable to those raised by Appellants were expressed when tele-

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27. *See, e.g., Town of Palm Beach v. Gradison,* 296 So.2d 473, 477 (Fla. 1974) (open meetings); *City of Miami Beach v. Berns,* 245 So.2d 38 (Fla. 1971) (open meetings). In *Wait v. Florida Power & Light Co.,* 372 So.2d 420 (Fla. 1979), the Florida Supreme Court held only government documents specifically exempted by statute are not public records and that courts could not create any common law exemptions thereto.

28. OFFICE OF THE ATTORNEY GENERAL, FLORIDA OPEN GOVERNMENT MANUAL (1978).

29. Art. II, §8, Fla.Const.

30. *See In Re Petition of Post-Newsweek Stations, supra,* at 370 So.2d 780.

31. *In Re The Florida Bar,* 316 So.2d 45 (Fla. 1975).

32. In *State of Florida ex rel. Miami Herald Publishing Company, et al. v. McIntosh,* 340 So.2d 904, 908 (Fla. 1977), the court held ". . . the public and the press have a fundamental right of access to all judicial proceedings."

vision coverage of the Florida Legislature commenced—fears vitiated by experience—and added:

> The court system is no less an institution of democratic government in our society. Because of the courts' dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of the government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance.

*Id.* It is difficult to imagine a more imposing array of state interests than those served by Florida's commitment to "open government."[33]

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33. These interests were ably summarized by the court in *Krause v. Reno*, 366 So.2d 1244, 1250-51 (Fla. 3rd DCA 1979):

> Among the important public aspects to be served by open meetings of governmental bodies are the following: First, there is the citizen input factor. . . . "[e]very meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality." Second, in addition to this need for citizen input, representative government requires that it be responsive to the wishes of the governed, because that is its ultimate source of consent. Third, open meetings produce stability and public confidence in government. Fourth, open meetings reported by the news media insure that our system of government will function as a genuine participatory democracy, i.e., the governed have a right to participate in their government. A fifth interest served by open meetings is the "checking effect" that open meetings have on government abuses. Meetings in public facilitate this "checking value." Even if most persons are unable to attend such meetings, they allow the news media to "watchdog" the conduct of public officials. Another interest to be served by open meetings is the public can better evaluate public officials and their projects by being privy to the decision-making process. . . . Also, public access to governmental meetings enables members of the public to understand more completely the decision-making processes of government and thereby consider future governmental developments and the consequences of those developments for their own lives.

### B. Florida's Canon 3A(7) Does Not Violate The Sixth Amendment Rights Of Appellants

Under our system of "federalism" a state need not adopt criminal procedures identical to those required in the federal courts.[34] The states may afford the accused greater protection than the federal constitution requires[35] and may extend greater protection to communication and expression than is mandated by the federal constitution.[36] Canon 3A(7) may provide greater protection to communication rights than does the federal system, but it also extends greater protection to the accused in that all of his Sixth Amendment public trial interests are enhanced by television coverage under the Canon.

Appellants argue cameras in the courtroom inherently prejudice Sixth Amendment rights. Appellants do not rely on the historical intent of the Framers for this proposition, or show camera coverage is logically inconsistent with the right to a fair trial. Instead they claim the presence of television cameras in the courtroom has such a psychological impact on trial participants they cannot function so as to preserve the accused's right to a fair trial. But this is a *factual* argument and no *facts* have been adduced to support it.[37] Appellants are reduced to asserting some jurors

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34. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Williams v. Florida*, 399 U.S. 78 (1970).

35. See Cases collected in Wilkes, *The New Federalism In Criminal Procedure Revisited*, 64 KENTUCKY L.J. 729 (1976); and Wilkes, *The New Federalism In Criminal Procedure: State Court Evasion of The Burger Court*, 62 KENTUCKY L.J. 421 (1974).

36. *Prune Yard Shopping Center v. Robins, et al.*, 48 U.S.L.W. 4650 (June 9, 1980); *Gannett Co. v. DePasquale, supra*, 61 L.Ed.2d at 630.

37. "Actual prejudice" is the only constitutionally relevant consideration where First Amendment interests are to be balanced. *Nebraska Press Asso. v. Stuart*, 427 U.S. 539 (1976); *Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961).

may feel self-conscious or may attribute special importance to televised proceedings, but neither self-consciousness nor the realization of "importance" equals prejudice.[38]

Appellants apparently believe that under *Estes* they need make no showing of prejudice, but *Estes* was predicated on the assessment of a technological level and the finding of a social perception now long outdated. Aside from the change in television as a medium, and in the public's perception of it described *supra*, the cameras used by Channel 2 today require only 50 foot candles of light, run silently, and weigh only a few pounds.[39]

Appellants and amici also urge that "privacy rights" will be compromised by television access. This argument proves too much. If accepted, it would require "private trials", and no such right exists.[40] Thus, Appellants' arguments are without merit.

## IV. FLORIDA'S CANON 3A(7) EFFECTUATES THE PUBLIC'S FIRST AMENDMENT RIGHT TO OBSERVE TRIALS

Television is a medium protected by the First Amendment,[41] and the First Amendment right to observe trials was recognized by this Court in *Richmond News*. The Florida Supreme Court has promulgated Canon 3A(7) as

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38. *U.S. v. Haldeman, et al.*, 559 F.2d 31 (D.C.Cir. 1976), *cert. denied* 431 U.S. 933 (1977); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied* 425 U.S. 911 (1976).

39. COMMUNITY TELEVISION REPORT, *supra*, at 9 n. 1. Cameras used by public television today have fine tuning white lights which illuminate when the camera begins to function, but these may be disconnected and are not noticeable.

40. *Richmond News*, at 5015; *Gannett v. DePasquale*, *supra*, 61 L.Ed.2d at 623.

41. *Herbert v. Lando*, 441 U.S. 153 (1979); *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

a reasonable "time, place, and manner" restriction on this medium's coverage of judicial proceedings.[42] Appellants would have this Court, absent any showing that Sixth Amendment rights will be compromised, invalidate Florida's reasonable "time, place, and manner" regulation of television coverage, and substitute for it an absolute Sixth Amendment right to exclude cameras.

Such a prohibition would be inconsistent with well-settled First Amendment doctrine:

(1) In *Richmond News* this Court held that the First Amendment right to observe trials may be abridged only where the trial court articulates in findings an overriding interest. *Id.* at 5015. No findings of an overriding interest were made here; in fact, Appellants have made no showing at all. *Richmond News* grants a right not only to attend trials, but also to see and hear the proceedings. As such, that right of sight and hearing, by whatever means, is protected.

(2) The exposition of past public television broadcasts of court proceedings shows the ban on camera coverage would impermissibly limit "the stock of information from which the public may draw"[43] and the disseminaton of such information.[44] Public television broadcast hundreds of hours of judicial proceedings to the public, and will continue to do so. If Canon 3A(7) is invalidated such ex-

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42. *See Richmond News*, at 5014; *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, 48 U.S.L.W. 4776, 4777 (June 17, 1980).

43. In *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978), this Court held invalid restraints reducing the stock of expression available to the public.

44. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court invalidated federal legislation which curtailed the audience expression could reasonably be expected to reach.

pression could not be aired, and public television would be virtually eliminated as a special source of information concerning the judiciary. Since public television communicates the judicial process to a far larger number of people than are able to attend judicial proceedings, the dissemination of such information will be radically curtailed.

(3) The prohibition of cameras in the courtroom would discriminate against perhaps the most effective means of communicating the judicial process to the public without any showing that a compelling state interest justifies such discrimination and without any showing ample alternative channels for communicating the judicial process exist.[45]

(4) Appellants argue that television broadcasts will not properly represent the courts to the public. Prohibition on that ground would be impermissible censorship.[46]

Restrictions on First Amendment rights must be narrowly drawn.[47] The Florida Supreme Court has so drawn Canon 3A(7) and there is no basis for this Court to impose an absolute restraint on activity so clearly protected by the First Amendment.

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45. *Linmark Associates, Inc. v. Town of Willingboro*, 431 U.S. 85 (1977).

46. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Craig v. Harney*, 331 U.S. 367 (1947).

47. *Consolidated Edison Co. v. Public Service Commission*, *supra*.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court should be affirmed or the appeal dismissed for lack of a substantial federal question.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, true copies of the foregoing Brief of Community Television Foundation of South Florida, Inc., the Public Broadcasting Service, the Florida Public Broadcasting Service, Inc., and WNET as Amici Curiae were served by mail upon the following this 18th day of August 1980:

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# APPENDIX

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May 1980

## THE PUBLIC TELEVISION AUDIENCE

### Size

More than two out of three American TV households (68.2%) tune to public television in the course of a month. That's about 52 million households, as reported by A.C. Nielsen for March 3 - March 30, 1980. More than 35 million households nationwide tune to public television on a weekly basis, representing a little over 46% of all U.S. TV homes. Moreover, people are watching public television more often than ever before. Families that view public television watch an average of almost 9 hours and 25 minutes on a monthly basis--an hour and a half more than they did just two years ago (March 1978).

### Audience Growth

Public television's monthly audience has increased a dramatic 39% over the past five years (March 1975 - March 1980). In prime time alone (8:00 p.m. - 11:00 p.m.), the monthly public television audience has climbed 55% since 1975. This means that over 38 million American households now turn to public television for their evening viewing during a month.

### Who Watches

The diversity, as well as the overall size, of public television's audience has also been growing. In terms of race, occupation, family size and geographic location, public television's audience represents a broad spectrum of the national demographic profile. Most significant of all is that some of public television's greatest gains in recent years were in those population groups that have been among the least represented in the PTV audience. In the past, public television has been somewhat skewed upward in terms of education and income. But in just the past five years, households with incomes of less than $10,000 and homes headed by individuals with less than a high school education have increased by about a third (28% and 34%, respectively) Today, more than half of all homes that fall in these categories are regular watchers of public television.

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The demographic profile of public television's nationwide audience as measured over a full month (March 1980):

| | % of All U.S. TV Households | (Distribution)* % of Homes Viewing PTV | (Penetration)** % of Group Watching PTV |
|---|---|---|---|
| RACE | | | |
| White | 87.8 | 89.1 | 68.9 |
| Non-White | 12.2 | 10.9 | 60.9 |
| FAMILIES WITH... | | | |
| No Children | 58.6 | 54.8 | 63.9 |
| Children 12-17 | 20.4 | 20.7 | 69.5 |
| Children 6-11 | 19.8 | 21.6 | 74.5 |
| Children Under 6 | 18.2 | 21.1 | 79.3 |
| FAMILIES HEADED BY PERSON... | | | |
| Who Didn't Finish High School | 33.0 | 26.9 | 54.3 |
| With 4 Years of High School | 33.5 | 34.6 | 68.6 |
| With 1-3 Years of College | 15.5 | 16.5 | 72.7 |
| With College Degree | 18.0 | 22.1 | 81.3 |
| FAMILIES HEADED BY... | | | |
| Professional/Manager | 22.5 | 26.3 | 78.7 |
| Clerical/Salesman | 13.5 | 13.0 | 65.9 |
| Blue Collar Worker | 35.4 | 34.6 | 65.9 |
| Not in Labor Force | 28.7 | 26.1 | 61.2 |
| FAMILIES WITH ANNUAL INCOME... | | | |
| Less than $10,000 | 32.3 | 25.4 | 52.5 |
| $10,000-$14,999 | 16.0 | 16.5 | 68.8 |
| $15,000-$20,000 | 15.7 | 16.6 | 72.1 |
| $20,000+ | 36.1 | 41.5 | 76.8 |
| FAMILIES LIVING IN... | | | |
| Northeast | 24.0 | 27.6 | 78.4 |
| East Central | 15.0 | 12.8 | 58.1 |
| West Central | 17.3 | 18.7 | 73.7 |
| South | 27.4 | 24.3 | 60.5 |
| Pacific | 16.4 | 16.5 | 68.8 |

*Distribution: Distribution is the percentage any given group comprises of the total number of households that view PTV. For example, of all households that view PTV, 10.9% are made up of non-white families.

**Penetration: Is the degree (expressed as a percentage) to which PTV viewing occurs in any given group in the U.S. Population. Using the same example, of all non-white households in the nation, 60.9% watch public television.

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Program Ratings

Public television's philosophy toward maximizing its audience is different from the approach taken by its commercial counterparts. Commercial broadcasters must aim their programming toward the widest possible audience in order to generate maximum advertising revenues. Public television feels it has a larger mandate. It too should provide service to the general public--a responsibility all broadcasters have. But public television believes it must also serve the many smaller and special publics with programming that may or may not attract large audiences. Accordingly, public television strives to reach the largest audience it can for any given program. Sometimes, in the case of general audience programs, that objective becomes the widest possible reach. Other times, it may mean all minority viewers or homes with young children of Hispanic families or hearing-impaired viewers. Public television does not necessarily strive to reach every American household all of the time, but it does hope to reach most of the public at least some of the time.

While the average prime time public television program is viewed by about 2% of all TV households, many general audience programs with high quality production values and well-funded promotion campaigns have reached much larger audiences. For example, among some of the most popular public television programs: THE NATIONAL GEOGRAPHIC SPECIAL "The Incredible Machine" was seen by more than 11 million families (16.0% of all households) when it premiered in late 1975; LIVE FROM THE GRAND OLE OPRY was watched by over ten million familes (14.6% rating) when it aired March 1979; and THE SCARLET LETTER--a four-part series--had a cumulative national audience of a little over 10 million homes (13.7% rating) when it was aired in the Spring of 1979. Science programs, like EINSTEIN'S UNIVERSE (7.3% rating); musical specials like the BIG BAND BASH (6.1%); and the weeknightly public affairs series, THE MACNEIL/LEHRER REPORT (6.9%), have all demonstrated the potential for gaining larger audiences for general programming on public television.

# memorandum

TO: Parker Thomson

FROM: Linda O'Bryon LO.

SUBJECT: Cameras in the Courtroom DATE: July 18, 1980

cc: John Felton, George Dooley

Here is some of the information you requested. We are continuing to research other Florida public stations for their experiences with cameras in the courtrooms.

WPBT COVERAGE OF THE STATE OF FLORIDA VS. JOHNNY L. JONES

From the selection of the jurors to the rendition of the verdict, each night during the trial of Johnny L. Jones, WPBT provided virtually complete coverage of the day's proceedings. A total of almost forty hours was boradcast from the opening day on April 21, 1980, to the trial's conclusion on April 30. Only procedural matters and lengthy sidebar conferences were deleted from the presentation.*

Channel 2 provided the pool feed to other local stations, following the guidelines of the Florida Supreme Court ruling permitting cameras in the state's courtrooms.

The Johnny Jones case received extensive pre-trial publicity, in what the news media dubbed, "the gold-plumbing caper." Once the trial was underway. the jury was sequestered and instructed not to watch the televised coverage or read newspaper accounts of the proceeding. Jones was the first black to be appointed Superintendent of the Dade County School System, the fifth largest school system in the nation. Jones was charged and found guilty of second-degree grand theft.

The trial generated strong interest and concern in the entire community, and Jones's conviction by an all-white jury further aroused public debate of questions of whether blacks were obtaining equal justice in the criminal justice system.

Channel 2 received hundreds of phone calls during the coverage, and on one night when the trial coverage was delayed from earlier scheduled time by one hour, about 500 calls came in from people who wished to view the trial. We counted a total of 233 letters regarding the coverage -- and of those 183 were favorable, or about 80 percent. Most of those viewers who had negative responses were concerned about pre-emptions of regularly-scheduled programming.

Following the trial, Channel 2 began post-production on a one-hour presentation of the highlights of the trial. This presentation will be used for awards entries and as a permanent record of the trial segments.

* Each night's broadcast began at 8:00 or 9:00 p.m. and ran uninterrupted for up to five hours. Channel 2 news anchors provided the lead-ins and bridges using an objective reporting style, with no analysis or commentary.

2

WFSU TALLAHASSEE

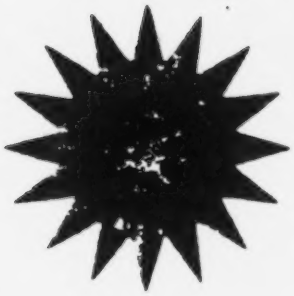
WFSU produced a total of 11 hours of coverage of the murder trial of Theodore Bundy, who was tried in Miami. WFSU was the pool camera for the other television stations and networks. From July 29, 1979 to July 31, the station produced 18 half-hour programs, on the highlights of the day's events. The station provided live coverage of the publishing of the verdict and a two-hour live broadcast of the sentencing. The 18 half-hour programs ran on all Florida public stations, except in Miami where Channel 2 opted not to run the coverage. A total of 16 stations outside the state ran the entire programs(these were all public stations). And, the networks &commercial stations in cities around the nation used brief segments of the pool coverage for local and national newscasts.

Producer Ed Hula says the coverage aired from 7:30 to 8:00 p.m. in Tallahassee and at 11:00 p.m. in most other markets. The live coverage of the verdict and sentencing was carried only in Tallahassee. Hula says the average share for the coverage was a 33 or 34, and he will look into the total number of viewers figure and call back with that information.

FLORIDA PUBLIC BROADCASTING -- Based in Tallahassee
providing regular news feeds and public affairs' programming to the Florida public stations.

Harold Baker, who heads up FPB, listed the following programs or segments FPB has broadcast on the Florida Supreme Court proceedings:

- Several execution hearings
- Oral arguments on environmental concerns regarding estuaries around the Ft. Myers area. This half-hour program included segments from the Florida Supreme Court.
- Safe-driver incentive plan (12 to 15 minutes)
- State-Land Acquisition segment
- Half-hour documentary on death with dignity, with oral arguments before the Supreme Court on that issue.
- Half-hour program on Supreme Court Jurisdiction. (this was a ballot amendment question).
- Swearing in proceeding of two new Justices: Parker Lee MacDonald and James E. Alderman
- A segment on Fred Karl, using footage of the Court
- Plans to produce a half-hour documentary on the workings of the Florida Supreme Court



# FLORIDA PUBLIC BROADCASTING

July 18, 1980

Ms. Linda O'Bryon
WPBT-TV
P. O. Box 610001
North Miami, Florida 33161

Dear Linda:

After our conversation of yesterday on the Supreme Court suit, I received the DACS from Deborah Werbner and decided to fill you in a bit more on our in-court coverage.

Some points to be made on the Florida Supreme Court tapings.... in all instances, we have handled the pool coverage on those items listed on the accompanying page. That means that, in all instances, the material has been distributed either through the daily satellite news feed or in our documentaries to all nine of the Florida PBS stations. Staffers or stringers who have patched into our distribution amplifier have represented up to as many as twelve commercial stations on a single story...or as many as 21 stations getting material from the court coverage.

Further, on the enclosed sheet, the dates listed on coverage are not always the EXACT day in which the coverage took place, but the air dates. The latter is true in the documentary presentations; it is same day coverage on feed material.

FYI, we are working with the Court to install permanent audio and video cables to a room below the chamber so that we may be even more unobtrusive than we ha ve been in the past. Heretofore, we have had our recording gear in a hallway outside the chamber.

Sincerely,

Harold Baker
Executive Producer

cc: Deborah Werbner
Dick Brown

FLORIDA PUBLIC BROADCASTING NETWORK COVERAGE OF COURTS:

| | |
|---|---|
| 7/8/77 | Florida Supreme Court; Rutledge murder hearing; first case to be heard under cameras-in-the-courtroom test. |
| 9/9/77 | Florida Supreme Court; oral arguments on the Florida safe driver incentive plan; 16:10 used in a documentary. |
| 9/16/77 | Florida Supreme Court; Spenkelink murder case, used in weekend wrapup news show. |
| 9/16/77 | Leon County Circuit Court; same as above. |
| 2/3/78 | Florida Supreme Court; oral arguments on the state environmental and land management act. |
| 2/3/78 | Florida Media-Bar discussion in Orlando on cameras in the courts; approximately 20 minutes used in a documentary which included Supreme Court footage. |
| 2/10/78 | Florida Supreme Court; resignation of Justice Fred Karl; used file footage of his swearing in ceremony, activities in the court, and speculation on successor. |
| 3/23/78 | Have notes on story on Justice Joseph Hatchett, including interview, but no details on subject; Supreme Court footage used. |
| 4/11/78 | Florida Supreme Court; investiture of Justice James E. Alderman. |
| 8/25/78 | Constitutional Revision of Merit Retention; taped with Justice Ben Overton and Judge Tyrie Boyer at Supreme and Appellate Courts; used in revision program. |
| 8/28/78 | Florida Supreme Court; notes show FPBN provided pool coverage for all stations, but does not indicate subject. |
| 9/1/78 | Commission on Appellate Court Structure; organizational meeting in the Florida Supreme Court chamber, with Justices England and Overton. 8:33 story. |
| 9/15/79 | Half-hour documentary on death with dignity; entire program was based on oral arguments before the Florida Supreme Court and questioning by the Justices. |
| 9/19/79 | Commission on Supreme Court jurisdiction; Justices participated, and file footage from the Court. |
| 10/26/79 | Florida Supreme Court; investiture of J ustice Parker Lee McDonald. |

FPBN - 2

12/14/79 Half-hour documentary on the death penalty, portions of which came from the Florida Supreme Court.

1/17/80 File video sent to the PBS stations upon request for use as background for Florida Supreme Court stories.

2/6/80 Florida Supreme Court; J ames Adams clemency hearing.

2/11/80 Florida Supreme Court; Douglas Meeks clemency hearing.

2/25/80 Second version of file footage sent to PBS stations for use in Florida Supreme Court stories.

2/28/80 Florida Supreme Court; Justice Arthur England has case load demonstration to support a proposed amendment on Supreme Court jurisdiction.

3/7/80 Half-hour documentary on a proposed constitutional amendment on Supreme Court jurisdiction, portions of which were shot in the Supreme Court and the Justices' chambers.

7/18/80 Half-hour documentary on a landmark case involving state environmental interests versus private development; oral arguments in the Florida Supreme Court and on-site taping near Fort Myers.

September or October: Plans already have been laid for a documentary on the Florida Supreme Court; probably a half-hour program.

Also, at this writing, plans are to cover a tax case caused by the last session of the Legislature on Monday, July 21. Can confirm after then.

There were a large number of other items associated with the Florida Supreme Court, such as interviews with Justices England, Sundberg, and Adkins, as well as Attorney-General Jim Smith, Governor Bob Graham, Attorney Tobias Simon, and others on the Supreme Court jurisdiction question...used in news and public affairs programs.

In addition, some of the Florida Supreme Court stories were fed to the national PBS news; we have no way of knowing for certain which ones were re-fed to the other stations.

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PUBLIC BROADCASTING SERVICE PBS 475 L'ENFANT PLAZA S W WASHINGTON D C 20024 (202) 488-5000

# PUBLIC TELEVISION AT 1980
...in the forefront

January 1980

The seventies. For public television, it was a decade of change, a time of re-examination, experimentation and growth. In the 70's public television took the time to look ahead, while serving an ever-expanding public.

Ten years ago, less than two-thirds of the American people were able to receive a public television station. There were no reliable means of accurately measuring its audience. In 1970, there were about 200 public television stations. Today, public television, in the words of the Carnegie Commission, is a "national treasure"; its 283 stations have the potential to reach 87% of the American people. In the course of a month, nearly 50 million families regularly watch public television programs.

Ten years ago, there were just about 20 hours of national programming available each week for public television. Today, the public television schedule is a model of diversity, a forum for excellence, a proving ground for new and innovative programming. Much of the growth is attributed to a dramatically expanded financial base.

Each week, more than 90 hours of national programs are presented, including the best of the performing arts, a wide range of documentaries and in-depth news analysis, and a children's program line-up that has won public television the endearment of families across the nation and the world. And that's just the national picture. Local stations enhance this schedule with their own local arts and public affairs programs, coverage of community events and special instructional services.

Ten years ago, public television's total revenues were barely $100 million. Public television's income has since increased four-fold (over $460 million in FY 1978), in tandem with the rise of public support. More than 2.5 million families now contribute annually to their local public TV stations, accounting for over $65 million.

Ten years ago, public television was far from state-of-the-art: programs were passed from station to station through the mail, and equipment at many stations included antiquated transmitters and hand-me-down cameras. Today, public television is the first American television system to rely fully on satellites for national program distribution. It has pioneered multi-channel television sound, captioning for the hearing-impaired and major improvements in UHF broadcasting. In television technology, it has become the recognized trailblazer.

The story of public television in the 1970's is a story of an extraordinary transition. It began with public television as an obscure medium. Big on potential, high with expectations, but devastatingly short of resources and watched by relatively few. In just ten years it has become a mainstream force watched by millions, helping to set new standards for television programming in education, entertainment and public understanding.

## 1970

At the turn of the decade, noncommercial television was beginning to take form. The first noncommercial TV station, KUHT Houston, had been on the air for 17 years and was joined by 200 noncommercial TV stations. However, there was no efficient means of pooling resources for consistent quality programming nor for sharing existing programming. Also absent was a long-term federal commitment to help support non-commercial television.

That had begun to change, of course, before the 1960's had ended. Plans had already been made for the "educational" television system. The 1966 Carnegie Commission Report gave it a broader mandate -- a mission to serve all Americans with programs catering to specific, individual interests -- and a new name: public television. The Public Broadcasting Act of 1967, in great part a response to the Carnegie Commission's recommendations, gave public television a new foundation. It created the Corporation for Public Broadcasting (CPB) to nurture the system's development, provide a framework for regular federal support, insulate it from political interference, and create a national interconnection for the stations across the country.

Some stations like WNET New York, WGBH Boston, WETA Washington, D.C., KQED San Francisco, the South Carolina Educational Network, and KCET Los Angeles, had already developed production centers. And in October the system, with CPB's support, established a national program-distribution agency: the Public Broadcasting Service (PBS). Hartford N. Gunn, Jr., Vice President and General Manager of WGBH Boston, came to Washington to head-up this new organization as its first President.

PBS' initial program schedule (less than 20 hours per week, originating from 22 different production sources) was miniscule by today's standards, but it

included some of public television's finest hours. THE GREAT AMERICAN DREAM MACHINE, with its irreverent approach to current affairs, generated controversy, but also many new viewers. SESAME STREET gave rise to new thinking about what children's television can and should be. NET PLAYHOUSE and SAN FRANCISCO MIX provided innovative forums for the arts. Such public affairs series as BLACK JOURNAL, SOUL!, WASHINGTON WEEK IN REVIEW and THE ADVOCATES provided a chronicle of the current scene from a variety of perspectives. Julia Child gave cooking new meaning on THE FRENCH CHEF. Fred Rogers comforted millions of youngsters on MISTER ROGERS' NEIGHBORHOOD. And from Great Britain, Kenneth Clark's CIVILISATION and John Galsworthy's THE FORSYTHE SAGA established public television as a showcase for top quality programming from abroad as well as at home.

Funding austerity was a lingering concern, although there were encouraging signs. Total system revenues in 1970 amounted to $100 million -- nearly double the 1966 total of $58 million. And the federal appropriation to CPB -- $15 million in 1970 -- had tripled in just a year's time. Greater resources were being aggregated for program development, but public television was far from having the dollars necessary to realize its full potential and meet the very high programming expectations put on it.

## 1971

Buttressed by a new national structure and a gradually increasing (but by no means adequate) infusion of dollars, public television moved ahead. Sixteen new stations went on the air during the year. Total system income increased some 40%, to $140.8 million, with the CPB appropriation growing to $23 million. With the advent of new sources of direct production support from corporations and foundations, PBS transmissions expanded markedly, totaling 1,745 program hours in 1971 -- about 34 hours per week.

Principal among the new programs was MASTERPIECE THEATRE, which began with the historical biography, "The First Churchills." From the producers of SESAME STREET came a new series, THE ELECTRIC COMPANY, which showed youngsters how to read in entertaining fashion. SPECIAL OF THE WEEK, a weekly melange of documentaries cultural performances and contemporary arts, premiered with Frederick Wiseman's "Basic Training." HOLLYWOOD TELEVISION THEATRE began a regular presentation of first-rate drama. Humorist Jean Shepherd took a whimsical look at the nation's institutions on JEAN SHEPHERD'S AMERICA. Arthur Fiedler brought great music into America's living rooms with EVENING AT POPS. William F. Buckley, Jr. championed the conservative point of view on FIRING LINE. And public television demonstrated its remarkable flexibility in the coverage of special events with live, gavel-to-gavel coverage of the Senate Foreign Relations Committee hearings on Vietnam.

But there were clouds developing. The growth of hard-hitting public affairs programming on public television led, inevitably, to controversy. The 1971 National Educational Television (NET) special, "Banks and the Poor," identified 133 members of Congress and government officials with banking connections, and caused a furor in Washington. Sounds of discontent were strongest from the Nixon White House, which displayed particular ire over current affairs programs produced by Washington's National Public Affairs Center for Television -- some of it openly critical of the Administration. The President's concerns were capsulized in a November address before the National Association of Educational Broadcasters convention by Clay T. Whitehead, Director of the White House's Office of Telecommunications Policy. Whitehead cautioned station representatives against an alleged move toward "centralism" in public television with PBS playing the role of "fourth network." It was an indication of further conflicts down the road.

## 1972

Public television's controversial bent in public affairs continued to raise some eyebrows, but for the first six months of 1972 the system weathered the storm well. By the end of the year, 233 stations were on the air. The system's financial resources rose to $157.9 million. And, illustrating the dramatic progress in attracting audiences, A.C. Nielsen reported that over an eight week survey period, 36.1% of the nation's TV households tuned to public television -- an estimated 30% audience growth since PBS began in 1970. (Since 1974, public television's national audience has been calculated based on four-week surveys.)

Public television continued its pursuit of the classics with the debut of INTERNATIONAL PERFORMANCE, a series of outstanding cultural telecasts from France. Such film masterworks as "Grand Illusion" and "Battleship Potemkin" were presented on the new FILM ODYSSEY series. MASTERPIECE THEATRE offered Glenda Jackson in the magnificant "Elizabeth R." ZOOM! gave the nation's youngsters a chance to create a television program of their very own. Attention continued to be centered on current affairs, with such important premieres as BILL MOYERS' JOURNAL and the weekly journalism review, BEHIND THE LINES. Public television took on a heretofore taboo subject with "V.D. Blues," a national outreach special hosted by Dick Cavett. It spent a total of 37 hours at the 1972 Republican and Democratic National Conventions, and followed the Nixon-McGovern compaign on the weekly A PUBLIC AFFAIR.

The medium's inability to plan in the long term, due to the lack of a predictable financial base, continued to be a major cause for concern, and for action. Acknowledging that the year-to-year CPB appropriations established in the 1967 Public Broadcasting Act put a damper on future program development, Congress passed a revolutionary two-year funding bill that would provide the Corporation with a previously unheard of $155 million. It never came to pass.

In June, citing public television's alleged shift away from local concentration and toward the concept of networking, President Nixon vetoed the CPB funding authorization.

In the wake of the Nixon veto, relations between CPB and PBS broke down. An initial conflict arose over the Corporation's offer to fund a 22-hour program covering the Apollo 17 moonwalk project. PBS rejected the project, concerned that CPB was overstepping authority in the program selection process. The offer was ultimately withdrawn and negotiations were held between PBS and CPB over their respective roles in scheduling and program selection.

## 1973

In a year which showed public television viewers the real-life problems of the Louds in AN AMERICAN FAMILY, the family of public television was, for a while, involved in its own problems.

In January, the CPB Board unanimously passed a resolution which effectively asserted authority over the principal operations of PBS. The Corporation demanded full responsibility for all national programming and scheduling functions. Meanwhile, CPB announced its intention to withdraw funding for several PBS current affairs series, including WASHINGTON WEEK IN REVIEW, BILL MOYERS' JOURNAL and BLACK JOURNAL -- programs that had met with open White House disapproval.

The resulting station protest brought about swift changes in Washington. In March, station representatives voted to form a new representative body

consisting of the existing PBS; the Coordinating Committee of Governing Board Chairmen, a council of station lay leaders headed by Ralph Rogers of Dallas; and the Educational Television Station division of the National Association of Educational Broadcasters. The new organization, which retained the name Public Broadcasting Service, was unique in television. Owned, governed and partially funded by its member stations, the new PBS was given new duties by its member stations. PBS would continue to provide national program distribution and related program support services, but it would also represent the stations in Washington, D.C.

Within a month (May 1973) a new "partnership" agreement had been ratified by both PBS and CPB. In accordance with the "partnership" agreement, PBS retained jurisdiction over the national schedule and CPB gained greater control over program-funding decisions. More CPB funds were to be allocated directly to the stations. The two resolved to work together on matters of common concern.

The resolution of the PBS/CPB dispute had almost immediate positive effects for the system. In August, President Nixon signed a CPB funding bill calling for $130 million over two years, plus an additional $44 million for facilities improvement. For all of 1973, public television's income totalled $241.2 million, a sizable gain over the preceding year.

During 1973, Richard Nixon was to play another instrumental, albeit involuntary, role in public broadcasting's future. Throughout the summer, PBS gained considerable recognition with its prime time evening carriage of the Senate Watergate hearings. Watergate made many Americans aware of public television's offerings, such as THE TURNED-ON CRISIS, a sweeping study of America's drug problems; THE KILLERS, a series of reports on leading causes of death in this country; and "Juvenile Court," a disturbing documentary on the pitfalls of the court system for young offenders.

By the end of 1973, 211 public television stations were on the air.

## 1974

Public television broke new ground in its efforts to maximize the role of local stations in the governance of the national system by introducing a major shift in national program funding mechanics.

1974 saw the birth of the PBS-administered Station Program Cooperative (SPC), an unprecedented program marketing system which allowed each local licensee to select and, by pooling resources with the other stations, pay for a substantial portion of the national program schedule. Aided by the initial financial support of CPB and the Ford Foundation, the first "SPC" market financed roughly 10% of national programming. The emergence of the program cooperative as a principal program funding source, at the same time, permitted CPB to alter its funding posture from the role of program sustainer to that of developer. Concurrently, the Ford Foundation announced its intention to gradually withdraw its support to noncommercial broadcasting -- support which had been a major revenue source since public television's inception, amounting to nearly $500 million since 1952.

PBS accelerated work on several major technological projects, including the development of a system for captioning television programs for the benefit of hearing-impaired viewers; the development of the DATE (Digital Audio for Television) audio system, enabling the distribution of TV programs with up to four channels of high-quality sound; and of improved standards for UHF telecasting. The year also saw the creation of the Satellite Working Group, representing PBS, CPB and

National Public Radio, to study the feasibility of public broadcasting converting to program distribution via domestic communications satellite.

In line with the increased emphasis on strengthening the system at the local level, the Station Independence Program -- a project aimed at helping licensees gain visibility and non-federal financial support -- was established at PBS with Ford Foundation matching funds.

The year generated some of public television's most enduring series. GREAT PERFORMANCES provided a weekly showcase for the best in music, dance and drama. NOVA became the first national television series devoted to science. Public television gained a greater sense of immediacy in its performing-arts programming with the stunning concert series, IN PERFORMANCE AT WOLF TRAP. VILLA ALEGRE became America's first bi-lingual series, teaching youngsters understanding of Anglo and Latino cultures. And MASTERPIECE THEATRE presented the first of what was to be four remarkable seasons of "Upstairs, Downstairs." It was also a year of extraordinary specials. Major national outreach programs accompanied "Drink, Drank, Drunk" on alcoholism, and "Male Menopause: The Pause That Perplexes." And investigative reporting on public television reached new heights with "The Unquiet Death of Julius and Ethel Rosenberg."

For the first time, A.C. Nielsen reported that public television's national audience penetration in the course of a month had reached the 50% mark.

Public television income in 1974 totalled $166.6 million -- 80% of it coming from non-federal sources. And President Nixon, citing marked improvements in the system, called for a bill authorizing five years of long range federal funding for CPB.

## 1975

One of public television's most troublesome problems, the lack of a predictable financial base to aid in long-range planning, was overcome to some extent with the milestone Public Broadcasting Financing Act of 1975. The bill, quickly signed by President Gerald Ford, authorized five years of funding for CPB. Of equal importance, it made the availability of those funds contingent on public broadcasting's ability to match each appropriated federal dollar with $2.50 from non-federal sources. The matching formula had the dual effect of limiting the federal government's proportionate involvement in public broadcasting while giving the system an incentive to increase its support among the states, local governments, businesses, foundations and, particularly, the viewers themselves.

Toward that end, public television in March presented FESTIVAL '75, the first nationally-coordinated fund raising and public awareness campaign. Under the leadership of the PBS-administered Station Independence Program, the system raised some $6.3 million over an 11-day period of special, high visibility programming and local fund-raising appeals. The March FESTIVALS became an annual public television event.

Public television in 1975 demonstrated that excellent programming, backed by aggressive, effective promotion, can attract a major audience. A case in point was the March telecast of "The Incredible Machine," the first NATIONAL GEOGRAPHIC SPECIAL on PBS. Aided by a comprehensive multi-media campaign funded by Gulf Oil, "The Incredible Machine" attracted an equally incredible rating of 16% -- about 13 million households nationwide.

For programming, it was a banner year. Lee Remick sparkled as JENNIE: LADY RANDOLPH CHURCHILL. Public television viewers were able to earn college credit in conjunction with the dramatic anthology, CLASSIC THEATRE: THE HUMANITIES IN DRAMA. THE ASCENT OF MAN, Jacob Brownowski's dramatic study of anthropology, became an acclaimed PBS series. Renaissance art was probed in THE ROMANTIC REBELLION. Public television again broke new journalistic ground in its coverage of the Senate Select Committee hearings on the CIA. Specials on public television probed some of America's most pressing social problems -- breast cancer on "Why Me?", the welfare state on Frederick Wiseman's "Welfare," ghetto life on "Harlem: Voices and Faces," and the high cost of dying on "Since the American Way of Death." And the sensitive issue of mental illness was explored in the comprehensive series, THE THIN EDGE.

For the year, system income totalled $170.6 million.

## 1976

America's Bi-Centennial celebration and a hotly contested presidential campaign had heavy impact on the public television schedule in a year of significant growth. For the year, public television income reached $301.9 million -- a one-third increase over 1975 -- with major new funding commitments from both the public and private sectors.

In February, Lawrence K. Grossman, a commercial broadcasting and advertising veteran, became PBS's second President as Hartford N. Gunn, Jr., was named Vice Chairman of the Board. Grossman identified his first three priorities as "programming, programming and programming," stressing the need for greater efforts in public affairs, live coverage and ambitious new domestic productions.

Public television celebrated the Bi-Centennial with THE ADAMS CHRONICLES, its most expensive American-made dramatic production. Two veteran journalists, Robert MacNeil and Jim Lehrer, pioneered an entirely new concept in broadcast journalism -- the one-story-a-night newscast -- on the weeknightly MACNEIL/LEHRER REPORT. Independent producers found a major new national television forum for their work on DOCUMENTARY SHOWCASE. GREAT PERFORMANCES added choreography as a major new element to its cultural portfolio with "Dance in America." And the 1976 campaign was covered by public television in unprecedented fashion, with telecasts of the Presidential Forums sponsored by the League of Women Voters, the Ford/Carter debates, and innovative approaches to measuring public opinion on the weekly USA: PEOPLE AND POLITICS. After the elections, public television continued to follow Jimmy Carter's building of a new Administration with marathon coverage of the Cabinet Confirmation hearings in the Senate. For youngsters, public television introduced a major [illegible] series of specially commissioned animations on ONCE UPON A CLASSIC. VISIONS, the first television series showcasing original plays since the "Golden Age" of television in the 50's, began its first season. Dramatic specials such as "A Moon for the Misbegotten" and "Harry S. Truman: Plain Speaking" were major events of the television season. And Julie Andrews helped millions of Americans come to terms with the problems of children with learning disabilities on the outreach special, "The Hoper Children."

Looking ahead, stations gave their approval for the construction of America's first domestic communications satellite system for over-the-air television. And in a decision with far-reaching implications, the Federal Communications Commission authorized the use of the PBS-developed system of captioning programs for the hearing-impaired.

By year's end, 265 stations were on the air.

## 1977

Armed with perhaps the finest program schedule in its history, a mandate from Congress to seek out non-federal funding and the growing support of the American people, public television continued to raise its level of visibility. Two million American families became contributing station members, responsible for $45.2 million in system revenues -- a remarkable 335% increase in five years' time. In the course of a month, Nielsen reported, 42.8 million families tuned to public television with frequency. PBS' national program schedule topped $67 million in production and acquisition expenditures. Total system income climbed to $416.5 million.

Public television proved that, given the resources, its production capability ranked with the world's best. THE AMERICAN SHORT STORY became the first public television production to be purchased by the BBC. CTW (SESAME STREET, THE ELECTRIC COMPANY) broke the children's television mold with its production of THE BEST OF FAMILIES, a dramatic look at an American immigrant family at the turn of the century. SIX AMERICAN FAMILIES profiled people in widely constrasting life situations. For the first time, public television brought its cameras inside the famed Metropolitan Opera House for a live, full-length performance of the epic opera, "La Boheme." And it continued to showcase the very best from overseas: Derek Jacobi's magnificent portrayal of a stuttering Roman emperor in "I, Claudius" on MASTERPIECE THEATRE; Flaubert's ambitious dramatic chronicles on THE PALLISERS, and Liv Ullmann in Ingmar Bergman's masterful television production of SCENES FROM A MARRIAGE. Dick Cavett found a long-term home on public television for weeknightly interviews with luminaries from the worlds of art and literature on THE DICK CAVETT SHOW. Public television explored the confounding issue of rape and the law on the true-life drama, "The People Vs. Inez Garcia," and it helped promote understanding of the special problems of the handicapped in the outreach special, "Including Me."

The system began construction of the new satellite interconnection -- a $58.9 million undertaking which called for 149 receive-only ground terminals, a Main Origination Terminal near PBS's Washington headquarters, and five regional uplinks, to be connected via Western Union's WESTAR satellite.

As public television began to move out front in American communications, it became the object of increased scrutiny. After more than a decade since its first landmark study, the Carnegie Corporation announced the formation of a prominent new commission to study public broadcasting.

## 1978

In March the first segment of public television's satellite system was activated. With the satellite system fully in place by year's end, public television's programming could benefit from unprecedented flexibility. Where before PBS could transmit only a single program at any given time, it could now distribute three and often four channels simultaneously. For the first time, stations in remote areas such as Alaska, Hawaii and the Caribbean were linked to the rest of the system for instantaneous program delivery. With several transmission points in the system, national and regional programs could now originate from throughout the country.

Congress passed the second long-range funding bill: the Public Broadcasting Financing Act of 1978. This new legislation lowered the non-federal matching requirement to 2:1 and authorized CPB appropriations totalling $400 million in FY 1981-83. In the wake of 1977's highly successful "La Boheme," public television introduced LIVE FROM THE MET, a series of full-length Metropolitan

Opera performances. On an entirely different musical vein, public television journeyed to Nashville to present a full-length performance "Live from the Grand Ole Opry" -- for the first time on national television. Two extraordinary men --longshoreman artist Eric Hoffer and Hawaii's Father Damien, were profiled in "Eric Hoffer: The Crowded Life" and the original drama "Damien." Vladimir Horowitz was the first artist spotlighted in a series of memorable concerts live from the White House. Public television again raised eyebrows with three controversial, independently produced documentaries: "California Reich," on American Nazis; "The New Klan" on the newly active Ku Klux Klan, and "Word is Out," on homosexuality. World hunger was the topic of public television's first "Global Paper," a sweeping series of investigative reports on matters of paramount international importance. Frederick Wiseman's "Canal Zone" proved particularly timely as America debated Carter's proposed Panama Canal treaty. And, in celebration of public television's 25th year, the medium took time off for a light-hearted look at itself on "The Great American Dream Machine Revisited."

Newton N. Minow succeeded the retiring Ralph Rogers in the PBS chairmanship. In his inaugural address to station representatives in June, Minow noted that public television had become the focus of attention of government officials, outside observers and strategists, all as a result of progress and new-found popularity. It was time, Minow proclaimed, for the system to chart its own course for the decade which lay ahead.

## 1979...The End of a Decade

In January, the new Carnegie Commission on the Future of Public Broadcasting released the findings of its 18-month study. The 401-page report, "A Public Trust," made major recommendations for a newly designed system, including the replacement of CPB with a Public Telecommunications Trust, a new National Programming Endowment to encourage the development of quality programs and a national commitment to public broadcasting totalling $1.2 billion annually.

Meanwhile, public television pursued its own "Constitutional" initiative. A major study into public television's role in communications in the 80's was led by PBS Vice Chairman Hartford Gunn. At its annual meeting, the PBS member stations voted to create a new national structure. Capitalizing on the multiple-channel benefits of the new satellite system, the stations moved to reorganize PBS so that it could concentrate more on programming and related services. The "new" PBS would include three national program services:

One: prime-time, heavily promoted, high visibility, high quality series and specials. These programs would include major dramatic productions; timely, probing documentaries and public affairs programs; outstanding stage, concert hall and festival performances; programs on science and the universe; and comedy as well.

Two -- a special interest program service, providing programs of exceptional usefulness and relevance to target audiences, such as second-language series, programs of regional interest, vocational and skills series and minority audience efforts as well as a forum for long-form public affairs programs including gavel-to-gavel coverage of major Congressional hearings.

Three -- an educational program service that offers high-quality children's television, as well as educational and instructional programs for children and life-long learning for adults.

At the same time, the stations formed a new national association to take up the system planning and representation functions formerly assigned to PBS.

While this restructuring was going on, public television also put together one of the best program schedules in its history. 1979 was the year that public television enhanced its reputation for hard-hitting journalism, with specials like "Paul Jacobs and the Nuclear Gang," "The Energy War," "Palestine," "Rizzo" and "Tatooed Tears." It was the year that PBS offered an impressive parade of independently produced documentaries, such as "Black Man's Land," "Sinai Field Mission," "The Japanese," "Mr. Speaker: A Portrait of Tip O'Neill" and "An Act of Congress" plus many more. The Public Interest Video Network offered public television stations "live" coverage of the anti-nuclear demonstration in Washington, D.C. -- a first for PBS and independent producers, made possible by the satellite system.

No subject was beyond the reach of public television. Child abuse ("Raised in Anger"), drug addiction ("Methadone: An American Way of Dealing"), juvenile delinquency ("Bad Boys") and the plight of the displaced homemaker ("Who Remembers Mama?") were just some of the topics given exposure on public television.

It was the year that public television cameras went "live" for the Martin Luther King/Robert Kennedy assassination hearings, the Jupiter space launch, the signing of the Mideast Peace Treaty, the Carter Town Meeting in Elk City, Oklahoma, the DC-10 airplane hearings, and for special coverage of the Three Mile Island nuclear accident. PTV cameras were also there for the SALT debates and the UN Security Council debates on the Iranian crisis.

1979 saw public television carry virtually every major orchestra into the nation's living rooms: Boston, Los Angeles, Chicago, Minnesota, Philadelphia, Cleveland, Detroit, New York Philharmonic and the National Symphony. It was the same way with dance: Twyla Tharp, Alvin Ailey, the New York City Ballet, George Balanchine, the Joffrey, American Ballet Theatre, Martha Graham, Pilobous and the San Francisco Ballet. Audiences of unprecedented size saw performances by major opera companies, such as the Metropolitan, New York City and San Francisco.

Nathaniel Hawthorne's chronicle of Puritan America, THE SCARLET LETTER, gained critical and audience acclaim as one of public television's most ambitious productions. Curious links between the inventions of the past and modern technology were probed in CONNECTIONS. CAMERA THREE, for years a Sunday morning staple on CBS-TV, found a new home and evening time slot on public television. It was the year that public television added a new dimension of quality to entertainment with the dazzling Hollywood special, "Musical Comedy Tonight" and James Earl Jones' epic portrayal of the great Black artist and activist, "Paul Robeson."

Several new entries helped diversify the children's program lineup -- long a hallmark of public television. FOOTSTEPS was designed to help parents and children alike grapple with the tough "growing up" process. And RAINBOW'S END was especially important to hearing-impaired children.

No less than 50 nationally-recognized awards and honors were heaped on public television in 1979, including: three Alfred I Dupont/Columbia University Awards; five Action for Children's Television Achievement in Children's TV Awards; three George Foster Peabody Awards; two American Women in Radio and Television Commendation Awards; two Sigma Alpha Iota International Music Fraternity Awards; nine Ohio State Awards; seven Daytime Emmy Awards; twelve Emmy Award Nominations in the first-ever separate competition for national news and documentary programming; five Prime Time Emmy Awards; A Christopher Award, and two Media Awards for Economic Understanding.

1979 was also the year that the public television system undertook two historic initiatives -- "common carriage" and planning for the first-ever national "program fair" -- toward improving the effectiveness and development of national programming. An overwhelming number of stations supported "common carriage" of a scheduled block of highly visible national programs for the Fall, to maximize the effectiveness of public television's program promotion and give local PTV schedules increased exposure in the community. And plans unfolded for a "program fair" to exploit the best of the Station Program Cooperative (SPC) with the added excitement and benefit of a marketplace give-and-take.

Public television viewer support continued to grow with an unprecedented total of nearly $16 million received from the nationally-coordinated fund raising and public awareness campaign, FESTIVAL '79, held in March.

Public television's audience during 1979 reached new benchmarks both in terms of size and diversity. Over 45% of all U.S. TV households tuned to public television on a weekly basis (as measured in March 1979), with prime time viewing averaging between 18-24% of all homes. The greatest demographic gains for public television for 1979 included groups that heretofore have been under-represented in the PTV audience. Non-white households viewing public television (over a week's time) jumped to 37.3%; blue-collar homes rose to 42.9%, and homes headed by a non-high school graduate increased to 32.6%

At the close of the 1970's American public television had finally come into its own.

***

Public television enters the 1980's with a nationally recognized program schedule of quality and diversity, with an improved financial outlook, with a structure designed for the new telecommunications age, and with the technically sophisticated system of satellite distribution.

In a decade of change and challenge, public television's achievements are best appraised in the words of the second Carnegie Commission report:

> "In less than a dozen years, among the most turbulent and pivotal in our history, public broadcasting has managed to establish itself as a national treasure. From the backwaters of an industry long dominated by commercial advertising, the public system has come into its own. Millions now watch...applaud, and criticize a unique public institution which daily enters their homes with programs that inform, engage, enlighten and delight. In that sense, the ideal has been realized: public broadcasting has made a difference."

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Supreme Court, U. S.
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No. 79-1260

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

NOEL CHANDLER AND ROBERT GRANGER, *Appellants*,

v.

STATE OF FLORIDA, *Appellee*.

**On Appeal From The Supreme Court Of Florida**

## BRIEF OF THE CONFERENCE OF CHIEF JUSTICES *AMICUS CURIAE*

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**On Appeal From The Supreme Court Of Florida**

---

## BRIEF OF THE CONFERENCE OF CHIEF JUSTICES *AMICUS CURIAE*

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## INTEREST OF AMICUS CURIAE

The Conference of Chief Justices [Conference] is composed of the fifty state Chief Justices. On August 2, 1978, the Conference adopted Resolution I which concerns the electronic new media issue before this Court. The Resolution supports the authority of the Appellee to adopt procedural rules authorizing in-court electronic news media coverage of judicial proceedings.

In many state court systems where Conference members preside as Chief Justices, rules have been adopted to permit differing forms of in-court news media coverage of judicial proceedings. Other state courts have exercised their constitutional discretion and

have declined to adopt such rules. Some courts have not acted on this issue. The courts in the fifty state court systems have exercised their right under our constitutional structure to determine their respective rules of civil and criminal judicial procedure. The Conference, as a representative body, and its members have a substantial interest at stake in this proceeding.

Written consent, in accord with Rule 42, U.S. Sup. Ct. R., to appear as Amicus Curiae has been obtained.

## SUMMARY OF ARGUMENT

The right of state courts to regulate state civil judicial procedures is drawn from state constitutions and our federalism. Examination and reexamination, by state courts, of the in-court presence of the electronic news media, *vel non,* is an exercise of authority reserved to the states under our federalism. It is also a recognition that this Court has never created a per se constitutional bar to the in-court presence of electronic news media. These state judicial procedures have emanated from various state experimental programs.

Some state courts have enacted guidelines and restrictions on the in-court presence of electronic news media in lieu of ad hoc determinations. State courts have taken care as a matter of constitutional responsibility not to infringe on any federal constitutional or statutory right.

## ARGUMENT

### I. Some State Courts Have Adopted Rules Regulating The In-Court Presence Of Electronic News Media.

States historically have maintained court rules

regulating the in-court presence of the news media.[1] Electronic news media, due to state judicial rules, generally has been prohibited from an in-court presence. Some trial courts have permitted, on an ad hoc basis, electronic news media coverage of trials since 1935.[2] In those early days this segment of the news media was both unique and embryonic. Electronic news media has emerged from its early days as a novel part of life in the United States to an apparently permanent role of a significant news transmitter to the public.[3]

The highest courts of at least thirty-five States have concluded that the issue of in-court presence of electronic news media needed to be reexamined. As in all issues of judicial procedure, states have not reacted to this reexamination with uniform conclusions.[4] Such state

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[1] In emphasizing the importance of state government, Hamilton in Federalist No. 17 focused on the state court system:

> There is one transcendant advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light — I mean the *ordinary administration of criminal-civil justice*. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government. The Federalist No. 17 (Hamilton) (e.s.).

[2] *State* v. *Hauptmann*, 115 N.J.L. 412, 180 A. 809 (Ct. Err. & App.) *cert. denied*, 296 U.S. 649 (1935).

[3] *Richmond Newspapers, Inc.* v. *Virginia*, 48 U.S.L.W. 5008, 5012 (July 2, 1980).

[4] Nineteen states permit coverage of trial and appellate courts, three permit coverage of trial courts only and the state court systems of at least twelve other states are studying the issue. Appendix B to Joint Brief of *Amici Curiae* Radio Televison News Direc-

court activity has not been inconsistent with the decisions of this Court and is an acknowledgement of the lack of a per se United States Constitutional ban. It is in furtherance of state efforts to determine whether and how improvements can be made to the respective state judicial systems. Such state activity is an appropriate and legitimate type of experimentation reserved to the states by the United States Constitution.[5]

## II. The Adoption Of State Court Rules Permitting In-Court Electronic News Media Coverage Of Judicial Proceedings Is A Fundamental Right Of The Several State Court Systems In Our Federalism.

### A. The Conference adopted Resolution I in furtherance of the right of state courts to adopt appropriate rules authorizing in-court electronic news media coverage of judicial proceedings.

In February, 1978 the Conference appointed a committee, composed of sixteen state court Chief Justices, to study the proposed amendment of Canon 3-A(7) of the Code of Judicial Conduct.[6] The proposed amend-

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tors Association, *Chandler* v. *Florida*, No. 79-1260. Local variation of this sort is a strength providing a basis for comparison not a weakness. *Addington* v. *Texas*, 441 U.S. 418, 430-31 (1979).

[5] *See Gerstein* v. *Pugh*, 420 U.S. 103, 123 (1975)("[W]e recognize the desirability of flexibility and experimentation by the States").

[6] American Bar Association, *Code of Professional Responsibility and Code of Judicial Conduct* 59 (1977). The Code of Judicial Conduct was written by the Special Committee on Standards of Judicial Conduct, including Mr. Justice Stewart, and was adopted by the American Bar Association on August 16, 1972. Canon 3-A(7) generally prohibits electronic news media coverage of court proceedings. *See generally* E. Thode, *Reporter's Notes to Code of Judicial Conduct* 56-59 (1973). Canon 3-A(7) is the successor to

ment provided for state courts to adopt rules authorizing appropriate in-court electronic news media coverage of judicial proceedings. Subsequent to the Committee report and extensive debate, the Conference adopted, on August 2, 1978, Resolution I.[7]

Resolution I provides that, under appropriate guidelines and restrictions, in-court electronic news media coverage of judicial proceedings should be subject to the discretion of each state supervising appellate court:

> NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices that the Canon 3-A(7) of the Code of Judical Conduct be amended by adding the following paragraph and the commentary:
>
> > Notwithstanding the provisions of this paragraph, the (name the supervising appellate court or body in the state or federal jurisdiction) may allow television, radio and photographic coverage of judicial proceedings in courts under their supervision consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in manner that will be unobstrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

The Conference concluded that adoption of appropriate in-court electronic news media coverage rules was consistent with protecting the constitutional rights of all parties. A clearinghouse, the National Center for State Courts, was also designated.

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Canon 35, which was originally adopted in 1937 and modified in 1952. *See Estes* v. *Texas,* 381 U.S. 532, 596-98 (1965) (Appendix to opinion of Harlan, J., concurring).

[7] See Appendix.

### B. State court rules authorizing in-court electronic news media coverage of judicial proceedings are an exercise of fundamental state rights under our federalism.

State courts historically have been empowered to establish the procedures under which state laws are enforced. This state judicial power is a part of the bundle of state rights drawn from state constitutions and the United States Constitution which "in all of the provisions looks to an indestructable Union, composed of indestructable States."[8] The in-court electronic news media rules are but another exercise of inherent state judicial powers that are *not* subject to proscription unless the rules "offend[s] some principle of justice so rooted in the tradition and conscience of our people as to be ranked as *fundamental*."[9]

Thus, as anxious as the federal judiciary may be to vindicate and to protect federal rights and federal interests, it must do so in a way "that will not unduly interfere with the legitimate activities of the States" which occupy "a highly important place in our Nation's

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[8] *Coyle* v. *Smith*, 221 U.S. 559, 579 (1911); *Texas* v. *White*, 7 Wall. 700, 725 (1868). Chief Justice Chase commended on this issue in *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1868):

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

[9] *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958); *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977); *Ristaino* v. *Ross*, 424 U.S. 589, 598 n.9 (1976); *San Antonio Indep. School Dist.* v. *Rodriquez*, 411 U.S. 1, 44 (1973); *Sailors* v. *Bd. of Educ.*, 387 U.S. 105, 109 (1967).

history and its future".[10] State courts, as well as other branches of state government, have long been described as appropriate forums for protection of state and federal constitutional rights.[11] As such, state courts are free to and are encouraged, by our federal system, to create alternative judicial means and procedures to meet changing social and economic needs of society.

In *Addington* v. *Texas,* 441 U.S. 418 (1979), this Court recognized that under the federal system states are given broad latitude to experiment in solving problems. That case presented the question of whether the "reasonable doubt" standard of proof used in criminal cases was constitutionally required to be used in mental illness commitment proceedings. This Court held that in commitment proceedings the Constitution required only a standard higher than mere preponderance of the evidence. In its opinion, this Court stated:[12]

> "That some states have chosen — either legislatively or judicially — to adopt the criminal law standard gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states. *The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.* As the substantive

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[10] *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). *See City of Greenwood* v. *Peacock*, 384 U.S. 808, 834 (1966).

[11] Federal courts have given substantial recognition to the inherent ability of state courts to resolve these issues: abstention-*Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941) *Carey* v. *Sugar*, 425 U.S. 73, 78 (1976); comity-*Juidice* v. *Vail* 430 U.S. 327, 334 (1977), *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); habeas corpus-*Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976), *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); judicial immunity-*O'Shea* v. *Littleton*, 414 U.S. 488 (1974), *Stump* v. *Sparkman*, 435 U.S. 349 (1978).

[12] 441 U.S. at 431 (note omitted and emphasis added).

> standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum."

Justice Brandeis has described restraints on the power to experiment, reserved to the states by the Constitution, as "fraught with serious consequences" since in large measure advances have been due to state experimentation.[13] State Government and the needs of the people it serves do not remain static. Efforts to initiate, to study and to act by states provide an opportunity to vindicate reasonable belief by experience. In many instances such state experiments form the basis for subsequent federal rules and programs.[14]

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[13] *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have the power to do this, because of the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Justice Brandeis' remarks have been cited by majority rulings as an essential thesis of our federalism and the Fourteenth Amendment. *E.g.*, *Whalen* v. *Roe*, 429 U.S. 589 (1977) (Stevens, J.); *San Antonio Indep. School Dist.* v. *Rodriquez*, 411 U.S. 1, 50 (1973) (Powell, J.). Dissenting Chief Justice Burger, joined by Justices Blackmun and Rehnquist, also relied on these remarks in *Brooks* v. *Tennessee*, 406 U.S. 605, 616 (1971).

[14] Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 Col. L. Rev. 847, 854 (1979). In addition, federal rules of

Application of the Sixth and Fourteenth Amendments to the states' federalism rights must be done in a manner that preserves the constitutional right of states to define and to experiment with the judicial processes by which the states' interests are implemented.[15] Justice Powell, in *San Antonio Indep. School Dist.* v. *Rodriquez, supra,* described the state's federalism interest as "a foremost consideration in interpreting *any* of the pertinent provisions under which this Court examines state action."[16]

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procedure already have video-taping as part of the discovery process. See Rule 30(b)(4), Fed. R. Civ. P.; *Colonial Times Inc.* v. *Gasch*, 509 F.2d 517 (D.C. Cir. 1975); *In re Matter of Daniels*, 69 F.R.D. 579, 581 (N.D. Ga. 1975).

[15] *Greenholtz* v. *Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979); *Apodaca* v. *Oregon*, 406 U.S. 404, 410 (1972); *Fay* v. *New York*, 332 U.S. 261, 296 (1947). Justice Frankfurter expressed serious concern about limitations imposed by the federal judiciary upon state experimentation:

> The veto power of the Supreme Court over the social-economic legislation of the states, thus exercised through the due process clause, is the most vulnerable aspect of undue centralization. It is at once the most destructive and the least responsible: the most destructive, because judicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error; the least responsible, because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matters of fact and opinion not peculiarly within the special competence of judges, behind the impersonal doors of the Constitution. The inclination of a single Justice or two, the tip of his mind or of his fears, may determine the opportunity of a much needed social experiment to survive, or may frustrate for a long time intelligent attempts to deal with a social evil. F. Frankfurter, The Public and Its Government 49 (1930).

[16] 411 U.S. at 44. Justice Holmes (dissenting) in *Traux* v. *Corrigan*, 257 U.S. 312, 344 (1921) elaborated on this view:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an im-

States have been exercising this federalism right to experiment with the in-court presence of electronic news media at least since 1935. In most instances these experiments occurred on an ad hoc basis as distinguished from formal or specific rules.[17] In *Stroble* v. *California,*[18] 343 U.S. 181 (1952), a constitutional challenge to a controversial 1949 in-court California television camera incident was rejected without comment by this Court. This Court in *Estes* v. *Texas,* 381 U.S. 532 (1965), while reversing the conviction on Sixth and Fourteenth Amendment violations due to the *factual* record, expressly recognized the *need* for further state

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portant part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

[17] *State* v. *Hauptmann,* 115 N.J.L. 412, 180 A. 809 (Ct. Err. & App.) *cert denied,* 296 U.S. 649 (1935). *See also Stroble* v. *California*, 226 P.2d 330 (Ca. 1951), *aff'd*, 343 U.S. 181 (1952); *Gonzales* v. *State*, 438 P.2d 686 (Colo. 1968); *Cody* v. *State*, 361 P.2d 307 (Okl. Crim. Ct. App. 1961); *Lyles* v. *State*, 330 P.2d 734 (Okl. Crim. Ct. App. 1958); *State* v. *Langley*, 323 P.2d 301 (Or. 1958) *cert. denied*, 358 U.S. 827 (1958); *Irwin* v. *Amhurst*, 74 P.2d 1127 (Or. 1938); *Bradley* v. *Texas*, 470 F.2d 785 (5 Cir. 1972); *Nicholas* v. *Henderson*, 389 F.2d 990 (6 Cir.) *cert. denied*, 393 U.S. 955 (1968); and *Bell* v. *Patterson*, 279 F. Supp. 760 (D. Colo. 1968), *aff'd*, 402 F.2d 394 (10 Cir. 1968) *cert. denied*, 403 U.S. 955 (1971).

[18] *Stroble* involved a very controversial first degree sex-murder of a young child. The crime, arrest and trial also generated significant sensational newspaper, radio and television publicity. Many news related events occurred, such as the District Attorney releasing "play-by-play" press releases and the Governor convening the California legislature in special session to study problems of sex "crimes." Legislative committee hearings were also held throughout California to gather testimony on "Stroble type crimes." *Stroble* has been cited with approval in *Estes* v. *Texas*, 381 U.S. 532, 541 (1965) and *Nebraska Press Assoc.* v. *Stuart*, 427 U.S. 539, 554 (1976). Chief Justice Burger, in *Nebraska Press*, described the *Stroble* decision as holding "that petitioner had failed to demonstrate a denial of due process." 427 U.S. at 554.

experimentation.[19] Justice Clark, in the plurality opinion, recognized that advances "may bring about a change in the effect of telecasting upon the fairness of criminal trials." Justice Harlan, concurring, described the situation as a "novel course of procedural experimentation" which was "one of the valued attributes of our federalism:"[20]

> Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation.

Justice Stewart, dissenting, also recognized this federalism attribute:[21]

> I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no matter how unobtrusive the cameras may be.

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[19] Justice Clark was joined in the plurality opinion by the Chief Justice, and Justices Douglas and Goldberg. Justice Harlan "concurs in this opinion subject to the reservations and to the extent indicated in his concurring opinion." The Chief Justice, with Justices Douglas and Goldberg, joined in the Court's opinion, but also filed a separate opinion expressing the view that cameras in state court rooms violated the Fourteenth Amendment. Justices Stewart, Black, Brennan and White dissented. Justice Brennan also filed a separate opinion characterized as a clarifying opinion.

[20] 381 U.S. at 587. In *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 552 (1976), Chief Justice Burger described *Estes* as a trial totally lacking in due process and presenting issues larger than in-court electronic news coverage. The Court in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), in an eight to one decision, described *Estes* as a situation in which the "totality of circumstances" produced a denial of Sixth and Fourteenth Amendment rights. The Court in *Murphy* v. *Florida*, 421 U.S. 794 (1975), in a seven-one-one decision, similarly described *Estes* as "a state court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage."

[21] 381 U.S. at 615.

*Estes* has *not* been interpreted to constitutionally preclude this federalism experimentation.[22] Such a multiple state experimentation program by the highest state courts in thirty-five states has been effectuated or considered subsequent to a thorough and deliberate study of the competing values and rights.[23]

### C. The adoption of state court rules permitting in-court electronic news media coverage of judicial proceedings is an implementation of state authority to provide rights beyond those granted by the United States Constitution.

One of the highest state judicial responsibilities is to apply the United States Constitution so as to preserve

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[22] Justice Brennan, in his clarifying opinion, stated the result reached in *Estes*:

> I merely write to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances.
>
> * * *
>
> Thus today's decision is not a blanket constitutional prohibition against the televising of state criminal trials. 381 U.S. at 617. (e.s.)

[23] *E.g., In re Hearings Concerning Canon 35*, 296 P.2d 465 (Colo. 1956) and *In re Petition of Post-Newsweek*, 370 So.2d 764 (1979). This Court in another context has labeled attempts by persons who, in the course of argument, resort to a parade of speculative horribles to fight phantom issues:

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. *New York* v. *United States* 326 U.S. 572, 583 (1946).

the federal constitutional rights of *all* parties.[24] Each state is also, as part of our federalism, empowered to adopt a higher state standard by statute, rule or constitution.[25] Rules adopted by state courts that permit in-court electronic news media are efforts toward such higher standards.

In *Stroble* and *Estes* the trial court did not have the benefit of court rules adopted by the state judiciary. Some state courts have filled this void to ensure full protection of all state and federal constitutional rights, to recognize the role the electronic news media has to inform the public and to fulfill the purposes of a public trial. In *Richmond Newspapers, Inc.* v. *Virginia,* there are statements in the Court's several opinions that the public now relies on the news media to gather facts and communicate news to the public.[26] The thrust of the opinions is that the media is the public's surrogate under the First and Fourteenth Amendments to gather and disseminate news. This makes it all the more necessary

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[24] Justice Rehnquist (dissenting) recognized this concept most recently in *Richmond Newspapers, Inc.* v. *Virginia*, 48 U.S.L.W. 5008, 5021 (July 2, 1980):

> We have at present 50 state judicial systems and one federal judicial system in the United States, and our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution. And that authority should be exercised with a full sense that the judges whose decisions we review are making the same effort as we to uphold the Constitution.

[25] Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976); *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *California* v. *Disbrow*, 545 P.2d 272 (Ca. 1976); *Commonwealth* v. *Triplett*, 341 A.2d 62 (Pa. 1975).

[26] 48 U.S.L.W. at, 5012, 5013, 5014 n. 12; Justices Brennan and Marshal concurring at 5016 n. 2. In this connection no distinction was drawn between the right of the print and electronic news media to be present in court. 48 U.S.L.W. at 5012, 5013 n. 9, 5014 n. 12.

to accommodate the in-court presence of the electonic news media. Thus, efforts by state courts to accommodate the in-court presence of electronic news media should be affirmed by this Court within due process and fair trial guarantees.

## CONCLUSION

State courts historically have regulated the in-court presence of electronic news media. The authority to do so is derived from common law, state constitutions and our federalism. Continued state court exercise of this constitutional right need not conflict with a party's state or federal constitutional rights. Such guidelines and restrictions as have been or are adopted by state courts to authorize the in-court presence of electronic news media are subject always to federal due process and fair trial guarantees.

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Date: August _____, 1980

# APPENDIX

## APPENDIX I

## CONFERENCE OF CHIEF JUSTICES

## RESOLUTION I

### Television, Radio, Photographic Coverage Of Judicial Proceedings

WHEREAS, the Conference of Chief Justices appointed a sixteen member committee in February, 1978, to study the possible amendment of Canon 3-A(7) of the Code of Judicial conduct to permit electronic and photographic coverage of the courts of our nation under guidelines that would preserve the decorum and fairness of our judicial proceedings; and

WHEREAS, the Conference has discussed, debated and considered the judicial canon which bans broadcasting, televising, audio recording or taking photographs during trial and appellate proceedings for news purposes; and

WHEREAS, the highest court in each state has the authority and responsibility to provide ethical standards, to upgrade the quality of justice administered and to improve the contact with the public in each state; and

WHEREAS, the news media, both print and electronic, serve an important role in informing the public and it is in the best interest of the public to be fully and accurately informed of the operation of judicial systems;

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices that the Canon 3-A(7) of the Code of Judicial Conduct be amended by adding the following paragraph and the commentary:

> Notwithstanding the provisions of this paragraph, the (name the supervising appellate court or body in the state or federal jurisdiction) may allow television, radio and photographic coverage of judicial proceedings in courts under their supervision consistent with the right of the

parties to a fair trial and subject to express condition, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

Commentary:

If television, radio and photographic coverage is permitted it should be supervised by the appropriate appellate body which supervises the courts within its jurisdiction. It is necessary that there be express conditions and guidelines adopted by the supervising court or body in order to provide a specific manner and means for this type of media coverage. These guidelines should include the type and location of equipment, the discretion left to the individual trial or appellate court, and the necessity, if any, to obtain the consent of the participants. Absent special circumstances for good cause shown, no consent appears necessary in appellate courts. Special circumstances may exist in all courts for the restriction of this type of coverage in cases such as rape, custody of children, trade secrets, or where such coverage would cause a substantial increase in the threat of harm to any participant in a case.

BE IT FURTHER RESOLVED, that the Conference designate the National Center for State Courts as the Clearinghouse for all photographic and electronic-in-the-courtroom information for various states and federal jurisdictions. In order to provide the complete exchange of information, the Conference recommends that each jurisdiction forward to the National Center all rules, statistics, guidelines, opinions, reports and other information pertaining to the use of photographic and electronic devices in the courtrooms of their states, and that all information be made readily available to the courts upon request.

Adopted at the Thirtieth Annual Meeting held in Burlington, Vermont, August 2, 1978.

Supreme Court, U. S.
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No. 79-1260

# In the Supreme Court of the United States

**October Term, 1979**

NOEL CHANDLER AND ROBERT GRANGER,
*Appellants,*

vs.

STATE OF FLORIDA,
*Appellee.*

## BRIEF OF AMICI CURIAE, FLORIDA NEWS INTERESTS ON DEVELOPMENT AND OPERATION OF FLORIDA RULE

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### INTEREST OF THE AMICI CURIAE

This brief is filed by the Florida amici, media interests in Florida familiar with the development and operation of the Florida Rule allowing access to cameras and means of electronic reporting.[1]

1. In addition to Post-Newsweek Stations, Florida, Inc. ("Post-Newsweek"), licensee of WPLG, Miami and WJXT, Jacksonville, the petitioner in the proceedings leading to the adoption of the Florida access rule, joining in this brief are: The Miami Herald Publishing Company, publisher of *The Miami Herald;* the Times Publishing Company, publisher of the *St. Petersburg Times;* the Florida Association of Broadcasters; Wometco Enterprises, Inc., licensee of WTVJ, Miami; Channel 9 of Orlando, licensee of WFTV, Orlando; Gaylord Broadcasting Company, licensee of WTVT, Tampa; Harte-Hanks Communications, Inc., licensee of WTLV, Jacksonville; Media General, Inc., licensee of WFLA-TV, Tampa; Palm Beach Newspapers, Inc., publishers of the *Palm Beach Post* and the *Palm Beach Times.*

The brief provides a description of the rule allowing camera and electronic journalism access to the courts of Florida, a history of how that rule was adopted and some of the details of the Florida experience.

This brief draws on the record in the rulemaking proceedings, *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979). (*"Petition of Post-Newsweek"*) to rebut statements made by appellants concerning that record.

## SUMMARY OF ARGUMENT

The Florida rule of court which governed the appellants' trial allows camera and microphone access, for news-gathering purposes, under strict guidelines which regulate the type of equipment and its location. The amount of equipment is limited; all movement and distracting procedures are prohibited. Confidential communications are protected. The trial judge has authority to prevent access where any trial participant shows a harm which is qualitatively different from other types of news coverage.

In adopting this rule, the Florida Supreme Court proceeded with great care and deliberation, basing its decision upon a background of broad experience and specific evidence. Ultimately, the court approved a permanent rule, relying on the experience of other states, the extensive Florida experience with open executive and legislative proceedings, and on the direct experience with scores of proceedings within the State where access had been allowed.

The Florida experience, with access over a period now greater than two years, indicates that courtroom access improves news coverage and aids the judicial system. The communication to the public is more honest and

presents a more dignified view of the courts. Experience has shown that access by cameras and microphones actually enhances the decorum of the highly newsworthy trial. The improved coverage has served to increase public discussion and understanding of the legal system without adverse impact on the defendant's right to a fair trial.

The actual experience of the thousands of persons who have participated in trials in Florida where access has been allowed reveals no basis for rejecting the reasoned decision of the Florida Supreme Court. The judgment of the court should be affirmed.

## ARGUMENT

### I.

### The Rule Allowing Access Operates to Protect the Interests of the Parties and the Public

The rule of access which governed the appellants' trial[2] allows camera and microphone access to court proceedings under strict rules. Anyone who has witnessed a speech, investiture or other public event at which camera crews have roamed at will may think that access to courts allows the presence of obtrusive camera teams, including an equipment carrier and a camera operator linked by cord, using intense lights and wandering throughout the courtroom. Under the Florida rule of court the reality is quite different.

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2. The same basic rule controls Florida proceedings now. The rule was reviewed after the experimental year and adhered to in a long, scholarly opinion, *Petition of Post-Newsweek*, 370 So.2d 764 (Fla. 1979). The Florida Supreme Court referenced and relied on that opinion on review of the present case. *Chandler v. State*, 376 So.2d 1157 (Fla. 1979).

First, the rule controls the equipment allowed and its use. In a trial court, no more than one camera for television news and one photographer for still pictures is permitted. Audio pickup from existing court installations is utilized where available.

When more than one news organization wishes to cover a trial, pooling arrangements, worked out by news organizations and *not* the court, are required.

The sound and light criteria are strict and "[n]o artificial lighting device of any kind shall be employed in connection with the television camera," 370 So.2d at 783.

Although the supreme court designates the standards for equipment, the order makes it the "affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment . . . meets the sound and light criteria . . .," 370 So.2d at 783.

There can be no movement. The chief judge of the circuit selects the locations for cameras and the rule limits movement by camera personnel. Further, the order requires that video tape recording equipment be "remote from the court facility." Film, videotape and lens can not be changed while the court is in session, 370 So.2d at 783, 794.

There is a specific rule protecting conferences between lawyers, lawyer-client communications and bench conferences, 370 So.2d at 784.

Finally, the trial judge is given authority over the proceedings to ensure that participants' rights are protected. Included in the *Petition of Post-Newsweek* proceeding is specific authority to exclude access and provide the trial

participants the opportunity to put on evidence of individual impact to show that access should be denied.[3]

The appellants do not suggest any flaw in the guidelines[4] nor any departure from these guidelines in their case.[5] Their position is that access may not be allowed under any rule because, it is contended, the mere presence of the camera causes a fundamental deprivation of due process. This position implicates a large number of proceedings where access is now allowed[6] and, indeed, implicates the present American Bar Association rule as well.[7]

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3. The *Post-Newsweek* opinion provides the following standard controlling exclusion:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from coverage by other types of media. 370 So.2d at 779.

An appellate court has reversed a conviction for failure to allow the defendant a hearing to prove special injury, *Green v. State,* 377 So.2d 193 (Fla. 3d D.C.A. 1979).

4. Indeed, counsel for the appellants participated in the rule-making proceedings and he did not suggest different rules.

5. The appellants do refer to an incident at trial when the judge admonished a cameraman (Appellants' brief, page 7). The record does not reveal the nature of this incident and no harm is claimed to the defendants from it. The incident illustrates that Florida judges maintain order in their courts and do enforce the strict guidelines under which access is allowed.

6. Presumably, the same impact applies to all other proceedings where rights are determined and at which cameras and microphones are allowed on a regular basis. Local government councils, school boards, administrative agencies and legislative bodies which have allowed news cameras and microphones for many years are suspect under the appellants' theory, yet no inhibiting impact has ever been claimed.

7. The American Bar Association Code of Professional Responsibility, adopted at one time by most state courts, allows cameras and microphones in the courtroom for educational purposes and to make a judicial record, but not for news gathering purposes. The appellants' position thus threatens not only the longstanding practice in state and local government (see note 4, *supra*), but also the practice in courts where microphones or cameras are used for purposes of making a judicial record or for educational purposes. The appellants do not state whether such a use, sanctioned by the American Bar Association and virtually every state, is claimed to constitute a per se violation of the defendants' rights.

Due to the strictness of Florida's access rule, it is apparent that the appellants must take an absolutist position in this case. Disorder and disrespect for the dignity of court proceedings are not tolerated in Florida. The appellants can obtain reversal only by convincing the Court that the mere presence of cameras and microphones inherently prejudiced the defendant's right to a fair trial.

## II.

## Florida Adopted a Rule Allowing Access Only After Lengthy and Deliberate Proceedings.

In both the jurisdictional statement and the brief on the merits, the appellants make sweeping derogatory statements about the motivations of the Florida courts and the techniques of decision employed by the Florida Supreme Court.[8]

The history of the Florida proceeding demonstrates the contrary—the Florida Supreme Court took great care with its decision and made that decision against a background of broad experience and specific evidence.

*The Petition.* The proceeding was initiated in January 1975, by petition filed directly with the Supreme Court of Florida. The petition suggested a change in the Code of Judicial Conduct through exercise of the court's constitutional authority to adopt rules governing the "prac-

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8. "[T]he Florida Supreme Court has cavalierly flirted with the possibility of irreparable damage to the most fundamental underpinnings of our criminal justice system." Appellants' Jurisdictional Statement at 14, *Noel Chandler and Robert Granger v. State of Florida,* No. 79-1260.

"The Florida Supreme Court authorized the televising of criminal trials without first assuring itself that no one's individual liberties would be impaired. *Post hoc* studies . . . reflects a total failure on the part of the Court to properly test and measure the reults of the experiment." Appellants' Brief at 12, *Noel Chandler and Robert Granger v. State of Florida,* No. 79-1260.

tice and procedure", FLA. CONST. Art. V, § 2. In April 1975, the court invited argument.[9]

*Court's familiarity with modern electronic equipment.* The petition was filed at a time when the Florida courts, like other contemporary institutions, were accustomed to the use of modern electronic equipment. Microphones and tape recorders were routinely used by court reporters and were permanently installed in many courtrooms.[10] Videotape equipment was coming into increased use for depositions in Florida[11] and the literature of judicial administration reflected other applications of the modern equipment such as the videotaped trial.[12]

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9. Notice of this and subsequent proceedings was widely circulated through official and unofficial means of communication including the *Florida Bar Journal*, the *Florida Bar News*, direct notice to lawyers' and judges' organizations and through regular news channels.

10. The Florida Supreme Court chambers have microphones and tape recording equipment. A rule allowing tape recording for the record in trial proceedings has also been adopted by the Florida Supreme Court. FLA. R. CT., JUD. ADMIN. 2.070.

11. There was authority that videotape depositions were proper and rules had been adopted by other jurisdictions. *See, e.g., Marlboro Products Corp. v. North American Philips Corp.*, 55 F.R.D. 487 (S.D.N.Y. 1972); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975); *United States v. LaFatch*, 382 F.Supp. 630 (N.D. Ohio 1974); *Matter of Daniels*, 69 F.R.D. 579 (N.D. Ga. 1975).

The courts assumed that the microphone and camera did not impact trial participants in any way significantly different from the impact of a court reporter or the already awesome court environment.

12. McCrystal, *Videotape: Relief for Our Congested Courts*, 49 DENVER L.J. 463 (1973); McCrystal and Young, *Pre-recorded Videotape Trials - an Ohio Innovation*, 39 BROOKLYN L. REV. 560 (1973).

There was also the experience of courts which had used television or other broadcast devices to transmit the trial proceedings to other audiences either in the courthouse where the courtroom was too crowded, or for educational purposes. Closed circuit television has been used in Michigan to transmit actual trials to a law school. Brennan, *Videotape - The Michigan Experience*, 24 HASTINGS L.J. 1, 2 (1972).

Thus, the question presented was not whether lawyers and witnesses would be exposed to cameras and microphones in court proceedings but, rather, the question of whether news could be collected with that equipment.

*Experience of legislative and executive agencies.* Public officials including members of the Florida Public Service Commission,[13] the Speaker and the former Speaker of the House of Representatives[14] and the Chairman of the Florida Pollution Control Board reported to the court on their experiences with camera access. Administrative and legislative proceedings in Florida are open to news cameras and microphones and these agencies resolve important issues. Decisions are routinely made which impact directly on freedom, property rights, taxation and other grave matters of public policy. In clemency proceedings, the Governor and Cabinet literally decide issues of life or death while other hearings, such as ratemaking proceedings for public utilities, involve many millions of dollars. No reports of adverse consequences to the administrative and legislative fact finding and decision making processes were received.[15]

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13. William Bevis, the immediate past chairman of the Public Service Commission, in his letter of February 18, 1975, wrote:

> Television cameras have not distracted our proceedings and the Chairman has been able to control the situation at all times.

14. For some years the Florida legislature has allowed television coverage and, during legislative sessions, there is a lengthy (one hour or more) program broadcast on public television each evening entitled "Today in the Legislature." Leroy, Watring and Lyle, *Today in the Legislature—The Florida Study*, 24 J. COMMUNICATION 92 (1974). In 1978 the Federal Congress began its experiments with direct electronic news coverage of its day-to-day proceedings. The house voted in 1978 to make this a permanent program. H.R. Res. 866, 95th Cong., 1st Sess. (1978).

15. Many local government proceedings have been broadcast for years and there are instances of very lengthy coverage on a routine basis.

(Continued on following page)

*Judicial Comments.* Endorsements for a change in the access rule also came from several Florida Circuit Court Judges including John Santora, who had experience with camera access during his legislative service and during his earlier service as a municipal court judge. A portion of Judge Santora's April 22, 1975 letter endorsing access reads as follows:

> From 1959-1970, I served as Municipal Judge for this city [Jacksonville]. Approximately two hundred fifty misdemeanants were tried each day, five days per week. In 1960 and 1964, we experienced severe racial riots and, as was the custom in those days, national as well as local television requested permission to film the proceedings. I granted permission . . . not only because I wanted the rest of America to see that the proceedings were conducted fairly and without prejudice but also to ensure local residents of the impartiality of the judiciary in disposing of what was then a very real and explosive issue.

*Experience of courts in other states.* Prior to allowing access, the Florida court was able to benefit from the activity of other courts, particularly those in Colorado, Washington, Alabama and Nevada.

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Footnote continued—

For example, Don MacCullough, Director of Educational Media Programs for the Dade County school system, filed a statement with the court which told of broadcasts since 1972. He explained that, at approximately thirty meetings a year, each lasting from two to eight hours, as many as twenty to thirty speakers at a single meeting "present their views with little apparent concern that they are on television." Mr. MacCullough stated, "I do not know of an instance in which an individual who wanted to present ideas to the School Board hesitated to do so because of the television cameras." He concluded his statement as follows:

> From my perspective of more than twenty years in the audio-visual communication field, I believe that television cameras have become so commonplace that most children and adults are little concerned by their presence in a classroom, in the studio, or at a public meeting.

*Colorado*: The Colorado Supreme Court was the first court to actually conduct a hearing on the subject of camera and microphone access. The hearing convinced a skeptical justice that access was consistent with the right to a fair and orderly trial.[16]

*Washington*: On October 6, 1975, the Florida Supreme Court viewed the videotape of a Seattle, Washington criminal trial and the videotaped interviews of the trial participants which were done as a part of a Washington Supreme Court examination of the rule barring access. The court also received the report filed in the State of Washington which found that there was no disruption of the proceedings.[17]

*Alabama*: Alabama opened the subject of access in early 1975, at about the time that the Post-Newsweek petition had been filed in Florida. In December 1975, Chief Justice Howell Heflin[18] released the Alabama Supreme Court order adopting a Code of Professional Responsibility, which allowed coverage of trials by cameras and other instruments of electronic journalism under certain

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16. Justice Moore of the Colorado Supreme Court authored the opinion which allowed camera access in Colorado, *In re Hearings Concerning Canon 35*, 132 Colo. 591, 296 P.2d 465 (Colo. 1956). This opinion was based on the results of a court authorized proceeding to study camera access. Justice Moore admitted that he approached the proceedings with bias against such access, but was convinced by the study that such access was compatible with principles of fair trial and judicial decorum.

17. On July 24, 1976, the Chief Justice of Washington announced new rules, adopted after its study of the materials which had also been made a part of the record in the Florida proceeding. The Chief Justice noted that the decision to allow access was not based on a "snap judgment."

18. Chief Justice Heflin's conclusions about the Alabama rule allowing access are stated in his article entitled *Fair Trial v. Free Press: Time for a Rehearing?*, 61 JUDICATURE 154, 155 (October 1977).

conditions. The opinion relied, in part, on observations concerning the broadcast of church services.[19]

*Nevada.* In the summer of 1976, many public broadcasting stations across the nation aired a five hour documentary taken from sixty hours of videotape of a trial in Nevada.[20]

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19. These observations of the Alabama court are in line with Colorado Supreme Court Justice Otto Moore's statements in 1956:

> Has anyone been heard to complain that the employment of photographs, radio and television upon the solemn occasion of the last Presidential Inauguration or the Coronation of Elizabeth II was to satisfy an "idle curiosity"? Do we hear complaints that the employment of these modern devices of thought transmission in the pulpits of our great churches destroys the dignity of the service; that they degrade the pulpit or create misconceptions in the mind of the public; The answers are obvious. *That which is carried out with dignity will not become undignified because more people may be permitted to see and hear. In re Hearings Concerning Canon* 35, 296 P.2d at 469 (Emphasis supplied.)

The Florida court later received a statement from Father Donald Connolly, Coordinator of Community Relations, Archdiocese of Miami, who had experienced the televising of more than 4,000 religious services including several from the Vatican. He stated:

> It should be clear from the sketch of my activities above, that the Church is committed to the goal of reaching the widest possible audience. Televising is a service not only for those Catholics who cannot attend Mass in person, but just as important, it reaches non-Catholic viewers who are ignorant of Catholic theology and worship.
>
> The celebration of Mass is a solemn occasion. Attention is focused on the priest, on the liturgy of the missal or one's private prayers. *Any element which distracts the priest or worshippers would not be tolerated. In my experience I have never witnessed a Mass that has been disrupted or appeared an iota less solemn and dignified because of the presence of a camera.* (Emphasis added.)

20. Radio and Television News Directors Ass'n and Reporters Comm. for the Freedom of the Press, *Guide to Broadcasting From the Courtroom,* Nevada, (d) (1978). *See also,* Goldman, *News Cameras in the Courtroom During State v. Solorzano: End to Estes Mandate?* 10 S.W.U.L.Rev. 2001 (1978) (Sp. Nev. issue).

*Case law revealed that no per se prohibition of access barred an access rule.* The court was also able to determine that there was no *per se* constitutional impediment to camera access,[21] and that the *Estes* decision invited courts to allow access to this modern means of communication when technology and public acceptance reached a sufficient level.[22]

*Experimental Access Allowed.* Drawing on the experience in Florida with camera access at dispute resolution proceedings and on the experience of other states with news gathering by cameras and microphones in the courts, the court decided to institute a program of experimental access in Florida.[23] The process of information gathering

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21. In addition to *Estes v. Texas,* 381 U.S. 532 (1965), the Florida court received briefing on post-*Estes* cases including *Gonzalez v. People,* 165 Colo. 322, 438 P.2d 686 (1968), *Bell v. Patterson,* 279 F.Supp. 760 (D. Colo. 1968), *aff'd,* 402 F.2d 394 (10th Cir. 1968) and *Bradley v. Texas,* 470 F.2d 785 (5th Cir. 1972).

22. The plurality opinion in *Estes,* authored fifteen years ago, stated:

> It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. *But we are not dealing here with future developments in the field of electronics. Estes,* 381 U.S. at 551-552. (Emphasis supplied.)

Justice Stewart authored a dissent, joined by Justices Black, Brennan and White which touched on the same point:

> [I]t is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any per se rule which, *in the light of future technology,* might serve to stifle or abridge true First Amendment rights. *Estes,* 381 U.S. at 604. (Emphasis supplied.)

23. The appellants make much of the fact that the court met with a "total failure" to arrange for trials as part of the first approach to experimentation which required consents. The fact is that, where *advance* consents of all parties, witnesses and jurors must be obtained, a major obstacle to coverage is presented. In several instances consents were obtained and trials were scheduled in Tallahassee, in Gainesville and in Jacksonville but settlements, continuances and plea bargainings frustrated the coverage of these.

went forward,[24] and experience with the modern equipment covering public proceedings accumulated.[25]

On April 7, 1977, over two years after the petition was filed, the court decided to allow access for a one year period and invited suggestions for implementation of this access. Strict guidelines were adopted (see Point I) and the experimental year began under an access rule which is substantially identical to the final rule in use today.

The experimental year ended on June 30, 1978. Various media interests, including some amici, sought to extend the experimental year while the court was in the process of making its decision. The court denied these motions, terminating camera and microphone access during the period of evaluation.

*Evaluation.* Thereafter, for a period of approximately nine months, the court received and reviewed briefs, reports, letters of comment and studies. The court con-

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24. On January 16, 1976, a year after the Florida petition was filed and a month after the Alabama court had issued its ruling, the Florida court held the first in a series of conferences to discuss questions relating to camera coverage. In addition, several justices attended judicial conferences, bar meetings and other events where the topic was discussed.

On August 16, 1976, the Orange County Bar Association held a mock trial at which cameras were present.

On September 19, 1976, traffic court proceedings in Jacksonville were televised without problem.

On March 8, 1977, two members of the court made a detailed inquiry into the modern television equipment, checking to see that it was, as represented, noiseless and capable of operating without high intensity lights.

25. A series of legislative inquiries concerning official misconduct of state cabinet members and other officials also took place during this period in Florida. Impeachment inquiries were conducted under rules which allowed camera access and, like the earlier proceedings in the congressional Watergate hearings, the public was able to obtain direct information from televised reports.

ducted its own survey which has been partially treated in a lengthy portion of the appellants' brief.[26]

Prior to its decision, the Florida court was able to look at the substantial developments in other states which were reviewing and amending their rules governing camera and microphone access. The February 7, 1979 report of the National Center of State Courts reveals that five states had, at that time, adopted permanent access rules (they were Alabama, Colorado, Georgia, New Hampshire, Texas and Washington). Eleven states (including Florida) were involved with experiments and eight additional states were considering the issue.[27]

*Decision.* Following this review and evaluation, the court rendered its April 12, 1979 opinion, concluding the proceeding which had begun over four years earlier. A final rule was adopted which allowed cameras and electronic equipment to return to the courtroom on a permanent basis under the strict rules announced for the experimental year.

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26. Additionally, the justices were able to draw on their own experiences. During the experimental year, there were a number of occasions when appellate arguments were covered by camera and microphone. In its opinion, the court stated:

> From our own experience with electronic media coverage of oral arguments before this Court during the pilot program we found absolutely no adverse effect upon the participants' performance or the decorum of the proceeding. 370 So.2d at 769.

Justices also observed the trial courts. Indeed, Mr. Justice Adkins, an experienced trial judge before he became a supreme court justice, returned to the trial bench to preside at the highly publicized "Sandy Creek Murder Trial," in Panama City, Florida, which was covered by television, news photographers and radio. Public radio broadcast gavel-to-gavel coverage. Of course, all members of the court could see the routine news coverage of trials and make judgments about access from that source as well.

27. Reports from many of these states were available to the Florida Supreme Court prior to its decision. Other developments since the Florida decision are treated more fully in the amicus brief of the RTNDA filed in this case.

Although the court determined that access was not mandated under the First Amendment, access was allowed pursuant to the court's supervisory authority.[28]

The record of *Post-Newsweek* is extensive and demonstrates a commitment to a process of reasoned judgment. It supports the conclusion that the Florida court acted deliberately in approaching the access question and in reaching its decision. Some specifics of the Florida experience are detailed below in Point IV.

## III.

## The Rule Allowing Access Evolved As a Part of, and Reflects Florida's Special Commitment to Open Government

In adopting the rule allowing camera access the Florida Supreme Court indicated that "[t]he prime motivating consideration prompting our conclusion is this state's commitment to open government," *Petition of Post-Newsweek*, 370 So.2d at 780. The access rule is more easily understood in the context of the movement for open government which has occupied Floridians for two decades and which Floridians commonly believe to be essential to responsive and democratic government.

Florida government operates with an openness that may seem unusual to citizens of other parts of the country. Pride is taken from the fact that Florida's experiences and leaders have played a role in increased openness in other states and the federal system.[29]

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28. The Florida access rule is, however, consistent with the objectives of the First Amendment and the long-standing principles of open court proceedings reviewed recently by this Court in *Richmond Newspapers v. Virginia*, 48 U.S.L.W. 5008 (1980).

29. As Mr. Justice Harlan pointed out in *Estes*, one of the valued attributes of federalism is the opportunity for innovation through the diversity of experience of the fifty states and the

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Florida's "open meetings" or "Sunshine" law is one of the nation's most famous. Section 286.011, Florida Statutes, requires all meetings of state and local agencies, commissions and boards to be open to the public and this law has been generally regarded as playing a major role in the trend toward openness in government which has occurred throughout the country.[30]

Today, open meetings are generally accepted across the country and the principle of open government is no longer thought to be radical. However, at the time of enactment of the Florida Sunshine Law, and later the federal act,[31] fears much like those now expressed to camera coverage of trials were raised. Actual experience proved that, contrary to many critics' apprehension, echoed today in the debate over courtroom access, public meetings

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Footnote continued—

federal government. *Estes v. Texas*, 381 U.S. at 587. Such diversity was promoted by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 789 (1974). As in *Gertz*, this case presents an issue that can best be resolved through individual state efforts. See brief filed on behalf of the Conference of Chief Justices.

30. "Just a few years ago, many people thought there was something radical about the idea that public officials should give up some of their habitual secrecy and let the public and the press into the rooms where decisions are made. Then, starting with the passage of Florida's landmark "Sunshine" law, the concept of open administrative and legislative meetings began to gain momentum. Today 48 states have some kind of open meetings law and 35 state legislatures conduct their committee deliberations in public view." Washington Post, Oct. 29, 1975, § A, at 26, col. 1

31. Senator Lawton Chiles (D-Fla.), who, as a state legislator, participated in passage of the Florida law, was the sponsor of the Federal Sunshine Act, and other Floridians were also prominent in the debate leading to its passage. Senator Chiles conceded that during preliminary discussions regarding Florida's Sunshine law he had apprehensions similar to those being expressed by some people about camera access. He explained, however, that experience will also prove these fears to be groundless. *Hearings Before the Subcomm. on Reorganization, Research, and Internal Organizations of the Senate Comm. on Government Operations*, 93rd Cong., 2d Sess. 260 (1974).

did not impede candid discussion, encourage "showboating", or subject decision makers to unacceptable pressures.

In Florida, over a decade of open meetings at every level of government has allowed considerable experience with camera presence. Citizens expect to find cameras at meetings of administrative agencies, school boards, county commissions, city councils, legislative deliberations and events of public debate. There has been no indication that the presence of cameras has adversely affected the quality of deliberations or the degree of citizen participation.

Florida's concern for opening the processes of government goes beyond the public meetings law. Simultaneously with its enactment in 1967, Florida adopted a strong public records law which opens virtually all state, county and municipal records to inspection by any person, FLA. STAT., Ch. 119.[32]

The openness of Florida government extends to the judiciary. In 1976, the voters adopted a constitutional amendment which opens judicial discipline proceedings, FLA. CONST. Art. V, § 12(d). Moreover, Florida courts have refused to close courtrooms to the public, except in the most compelling of circumstances. *State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904 (Fla. 1977); *Miami Herald Publishing Co. v. State,* 363 So.2d 603 (Fla. 4th D.C.A. 1978); FLA.R.CT., APP. PROC. 9.100.

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32. Another area related to public access to governmental proceedings and records is the requirement concerning the public disclosure of personal and campaign finances by public officials. Again, Florida has been in the forefront in requiring comprehensive disclosure. In 1978, the electorate adopted the "Sunshine Amendment" to the state constitution which requires public disclosure of income and net worth of public officers as well as reports of all campaign contributions and expenditures. The "Sunshine Amendment" survived constitutional scrutiny in *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978), *cert. den.,* 439 U.S. 1129 (1979).

The judicial rule allowing camera access is a further step in opening Florida government. Floridians look back on other advances that seem commonplace today but which, at the time of adoption, were greeted with fears much like those now raised. This past experience, as well as the actual experience under the judicial rule, provides confidence that the fears are groundless and the benefits substantial.

## IV.

## The Florida Experience Demonstrates That Camera and Microphone Access Is Compatible With Principles of Fair Trial

In retrospect, it is not surprising that Florida citizens, lawyers and judges accepted the advent of televised trials without major problems. Nonetheless, there were many people who, at the beginning of the access experiment, anticipated problems which have not materialized.

In the pages remaining, the extensive Florida experience with actual courtroom coverage will be reviewed.

### A. Courtroom Access Allows More Comprehensive and Higher Quality Coverage of Judicial Proceedings.

Courtroom access has resulted in improved news coverage of Florida's judiciary. For over two years, television and still cameras have had daily access to all state courts. The cases covered for broadcast number in the hundreds; the number of days on which cameras have televised trials in Florida courtrooms can be counted in the thousands.[33] The coverage has included civil and criminal trials, appellate proceedings, the routine as well as the

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33. Davis, *Television in the Courtroom*, 64 JUDICATURE 89 (Aug. 1980).

more sensational. On a typical day, at least in urban areas, the nightly news is likely to include scenes of courtroom activities.

While most of these proceedings would have been covered by the electronic media from outside the courtroom had access not been allowed,[34] the nature of the coverage has changed for the better.[35] Review of newsroom logs and the material aired reveals that news stories about courts have become longer and more detailed than those broadcast prior to access.[36]

The reason for the improved coverage is readily understood. Without access, trial coverage consisted of a reporter verbally summarizing the courtroom events accompanied by visual scenes of the undignified pursuit of defendants, witnesses, and attorneys down courthouse corridors or steps, or jurors disembarking from buses.

At its best, television trial reports, without benefit of courtroom access, features hastily drawn sketches of the trial participants. At its worst, it often consists of cam-

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34. Certain coverage of the court system would not have been possible without access. For example, during the experimental year, Post-Newsweek used the camera in the courts for a series on "The Peoples' Courts" which helped explain how those courts most often utilized by the public, such as traffic court, operate. The British Broadcasting Corporation (BBC) utilized camera access as an integral part of a thirteen part documentary entitled "Circuit Eleven, Miami," which was awarded honors as the most distinguished documentary series in Britain for 1978.

35. Following the experimental year, the Florida court reviewed statements of professional journalists concerning their perception of the impact of access on court reporting. These journalists were able to draw upon years of experience, including, in one instance, coverage of the Billie Sol Estes trial, in making their assessment. The statements of these journalists are included in the record of the *Post-Newsweek* proceeding now lodged with this Court.

36. During the evaluation following the experimental year, the Post-Newsweek stations reviewed their program logs and analyzed the coverage which had taken place, reporting the results to the Florida court.

eramen walking backwards down a crowded hallway taking pictures of other cameramen walking backwards and an occasional view of a bouncing microphone in front of a witness. Without access to the reality of the courtroom, the coverage is subjective and limited and news stories of courts often feature scenes of disorder.

In contrast, where cameras and microphones are allowed, the sights and sounds are those of the courtroom itself. The resulting image and sound are inherently honest. The reporter is freed to give background information and to provide perspective on the story. The public view of a judicial proceeding is that of an orderly courtroom.[37]

### B. Television Has Served to Educate the Public and to Raise Important Questions About the Judicial System.

The experience in Florida is that very significant questions concerning public policy and the judicial system have been raised and vigorously debated following major televised trials. The *Zamora* trial, televised in the evening hours, attracted a large audience and brought to very active public debate such questions as violence on television ("intoxication by television" was Zamora's defense), the treatment of juveniles and the competence of counsel.[38] The

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37. This improvement benefits the perception of the judiciary and results in a better informed populace. Television has become a dominant medium of communications in contemporary society and the American public views television a major source of news. Television is also regarded by the public as the most believable news medium. *See e.g.*, Roper Organization, Inc., *Changing Public Attitudes Towards Television and Other Mass Media 1959-1976* (1977). Substantial information concerning public use and perception of television was considered by the Florida court and may be found in the *Post-Newsweek* record.

38. *See e.g., Zamora TV plea, a valid defense, Rubin testifies,* Miami News, Nov. 21, 1979, at 4, col. 1; *"TV-Insanity" Trial was a "Farce," Zamora Says,* Miami Herald, Nov. 8, 1979, § D, at 1, col. 1; *Zamora asks new trial, raps Rubin's defense,* Miami News, Nov. 8, 1979, § C, at 1, col. 4.

recent televised trial of black school superintendent Johnny Jones before an all white jury has led to significant questions concerning the use of preemptory challenges where there is a racial element to the trial.[39]

It is impossible to gauge the extent to which public debate would have occurred in the absence of camera and microphone access, but it is clear that this access allowed a different quality of debate. Those citizens who spoke and wrote about lawyer competency and the fairness of jury selection had in their comments the sense of personal witness from the experience of actually watching large portions of these trials.[40]

### C. The Picture and Sounds of Court Proceedings Have Not Inflamed the Passions of the Community.

The appellants argue that television will somehow inflame the passions of the community against the defendants and, further, that television coverage of the recent "McDuffie" trial (in Tampa)[41] contributed to the May 1980

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39. In a subsequent trial related to the same events, the trial of school principal Solomon Barnes, the State Attorney agreed to start again on jury selection after the panel selected was entirely white. *See e.g., Jury Selection in Barnes trial will start over: Prosecution offers to explain challenges,* Miami News, July 11, 1980, § A, at 6, col. 1; *All-White jury for Barnes?: Prosecution denies charge of systematic exclusion,* Miami News, July 10, 1980, § A, at 5, col. 2.

40. *See e.g.,* Oglesby, *1-Race Juries Add to Injury,* Miami Herald, Apr. 28, 1980, § B, at 1, col. 1. ("I got the disturbing impression that jurors were selected only on the basis of color."); Whited, *Blacks Are Needed on Jones Trial Jury,* Miami Herald, Apr. 24, 1980, § C, at 1, col. 1. ("I recall that there were valid reasons for the prosecution to challenge those black jurors I happened to see."); Editorial, *Tragedy of Johnny Jones Touches Entire Community,* Miami Herald, May 2, 1980, § A, at 6, col. 1. ("Fortunately, Dade Countians had an unprecedented opportunity to judge for themselves whether racism was the seventh juror.")

41. McDuffie was a black citizen who died after being arrested and, allegedly, attacked by police officers.

riots in Miami. The charge has no predicate in either the record before the Court or the actual facts.

First, the grievances of a community do not depend on the source of news. In San Francisco, the trial of a man who shot a homosexual city official produced a result offensive to other members of the San Francisco homosexual community and a riot resulted.[42] In recent weeks, the nation has learned of another violent reaction to a jury verdict in Chattanooga, Tennessee.[43] There was no access allowed to cameras and microphones at these trials, yet the anger remained.

Second, access to the courtroom did not create the news event. Television stations would have covered the news of the "McDuffie" trial in detail as did newspapers, even had the cameras been barred from the courtroom.

Finally, it should be observed that the appellants' mention of this case contradicts another of appellants' points. The "passion of the community" was not inflamed by the television coverage in a way adverse to the police officer defendants in the "McDuffie" trial. Indeed, those defendants were found not guilty.

### D. In Highly Publicized Trial Situations, Camera and Microphone Access Render the Trial Environment More Compatible With the High Standards of Justice.

The major criminal trial, deemed newsworthy for whatever reason, attracts scores, sometimes hundreds of

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42. *See e.g., San Francisco Tense as Violence Follows Murder Trial,* N.Y. Times, May 23, 1979, § A, at 1, col. 3. ("Homosexuals . . ., suggested that the verdict had sparked a violent response because members of the large homosexual community here had not achieved their civil rights peacefully." *Id.* at 18, col. 4.)

43. *See e.g., Firebombs Scorch Alton Park Area: Outbreak Follows Verdicts in Controversial Klan Trial,* Chattanooga Times, July 23, 1980, § A, at 1, col. 5; *Racial Unrest: Chattanooga blacks protesting Klan acquittals in 4 shootings,* Miami News, July 24, 1980, § A, at 7, col. 1.

journalists, whether or not cameras and microphones are allowed in the courtroom.

The Florida experience with major trials at which access has been allowed has demonstrated that highly newsworthy trials such as that of the juvenile, Ronnie Zamora, or mass murder suspect Theodore Bundy become more manageable when the cameras and microphones are allowed inside the courtroom.

Once the television signal is made available by modern videotape equipment, a number of potential distractions are removed from inside the courtroom. Rather than multiple sketch artists with their artists' paraphernalia, a single camera operator at a fixed location is stationed in accordance with the court directive. That cameraman is not allowed to change film or otherwise conduct any distracting activities during trial. The signal is fed to a remote facility where videotape recorders are maintained and where monitors are located.

Thus, the highly publicized trial remains highly publicized but the actual courtroom environment is much less crowded, much quieter and much less distracting for the trial participants.[44] Reducing the large number of people in the courtroom also decreases the number of people entering and leaving, taking seats, whispering, coughing, laughing and reacting to testimony.

The difference is apparent not only inside the courtroom but outside. Rather than the groups of newsmen

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44. With the trial of Theodore Bundy, for instance, the remote facility was located on the top floor of a courthouse several floors away from the actual trial and it was at this remote facility where most of the enormous press corps collected during the Bundy trial. Reporters who wished to call in a story, smoke a cigarette, work with a typewriter or discuss the case among themselves found it much more convenient to be at the remote facility than in the courtroom itself where strict standards of decorum were observed.

with cameras and microphones located on the steps of the courthouse or in the corridors, there is a single camera inside the courtroom. Rather than forcing news reporters covering a trial to get their pictures outside in a mob, the reporters obtain their stories inside the courtroom where an atmopshere of decorum prevails. The communication to the public is more honest and presents a proper image of court proceedings.

### E. Surveys Demonstrate That Trial Participants Accept the Access Rule.

The Florida experiment provided an opportunity to study the reaction of trial participants to an access rule which allowed cameras and microphones to be used by news organizations. A number of surveys were conducted and reported to the court.[45]

A substantial portion of the appellants' brief (and those of amici) is devoted to an attack on one of these

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45. In addition to the survey conducted under the direction of the Florida Supreme Court, there was a survey conducted by the Conference of Circuit Judges which demonstrated that those judges who had experience with the camera access rule were favorable to camera access (36 positive, 29 negative and 37 neutral and, "the neutrals generally made favorable comments.") (*Post-Newsweek* docket sheet, July 21, 1978).

In the Strawn-FTU Survey, the answers ran in favor of cameras by 70% or more in all but one of the questions even though the survey technique polled judicial officers who had no experience with the access rule and who were antagonistic to it without any direct knowledge. (For instance, 55.6% of the circuit judges who experienced camera access favored it. Only 38.3% of those who had not had such experience were positive.) (*Post-Newsweek* docket sheet, July 21, 1978).

Judge Thomas E. Sholts of Palm Beach, who tried the Mark Herman case during the experimental year, conducted a survey of trial participants and, though Judge Sholts opposed the access rule, the survey was generally favorable to camera access.

There was also a survey of legal experts and chief judges of state supreme courts reported in the July 16, 1978 edition of *The Washington Post*. Twenty-eight of fifty state supreme court chief judges responded and the *Post* reported responses were favorable to increased access by a margin of 6-1.

studies, the survey conducted by the Florida Supreme Court following the experimental year. The attack is in two parts, first attempting to demonstrate that the survey was not scientific (Point IV, C. of Appellants' brief, pages 41-45) and then, arguing in reliance on the survey, suggesting that it supports appellants' contentions (Point IV (D), pages 52-68).

The appellants' attack attempts to create the impression that the survey was a very significant part of the court's evaluation technique and that it was relied on by the court as scientific. The court's opinion indicated, however, that the survey was conducted as an "aid" to the decision but that the court regarded it as "non-scientific." *Petition of Post-Newsweek,* 370 So.2d at 768 (Fla. 1979). The survey was but one of the sources of information available to the Florida court but, even though it is unscientific, it does support the Florida access rule. Mr. Justice Sundberg's opinion analyzes those results in detail, 370 So.2d at 768, 769, and reaches conclusions which are at great variance from the conclusions reached by the appellants. (Appellants' brief, pages 52-69.) The actual survey results do not support the many extravagant statements made by appellants.[46]

The petitioner, Post-Newsweek, objected to the survey by the court and argued that it so focused attention on

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46. The appellants' interpretation of the results is clouded with distortion particularly when several categories of responses (e.g. slightly, moderately, very and extremely) are grouped together as a "sum" percentage in order to support a particular conclusion. (Appellants' brief, pages 58-69.) This bunching of quantitatively different responses frustrates the survey's direct attempt to measure *degrees* of effect. The survey avoided a black and white, "yes-no" response format, and the appellants' argument distorts the result, substituting the appellants' answer for that actually given.

Another example of erroneous interpretation is appellants' conclusion that an invasion of appellants' constitutional rights is demonstrated by the fact that "only" 19.5% of the jurors and 20% of the witnesses were "not at all aware" of the electronic

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the cameras and microphones that responses would be similarly focused.[47] Thus, when courtroom distraction is discussed, a questionnaire which mentions cameras but not the judge's telephone, the bailiff's cough and the spectator's exit, runs the risk of producing a skewed answer.

To partially accommodate this objection, the survey included a few control questions. The answers to questions relating to newspaper coverage of a trial can be contrasted to questions relating to television or radio coverage to determine whether there are any significant differences in perception. For example, jurors were asked to evaluate the extent of their concern that, as a result of various types of coverage, people would know they were sitting on a particular jury and would try to influence their decision. The average response on a five point scale was 1.2 for newspaper coverage, 1.2 for radio coverage and 1.3 for photographic coverage.[48] (Questions 24a, 25a and 26a.) Witnesses were questioned about fear that someone would try to influence their testimony. The response was: newspaper coverage - 1.3, photographic - 1.32 and radio - 1.27.

Footnote continued—

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media's presence. (Appellants' brief, page 59.) "Awareness" and adverse effect are entirely different. "Awareness" of the camera, like awareness of the presence of the court reporter or the judge does not entitle the defendant to reversal.

The major portion of the actual survey results are included in the appendix submitted by the State.

47. The inequity of singling out camera and microphone access is demonstrated by the results of a phone survey conducted among 262 randomly selected Dade and Broward residents by WPLG, a Miami television station, and reported to the Florida Supreme Court. The question asked was:

> "During court trials, newspaper reporters are frequently on hand, along with artists sketching witnesses for TV news programs. Do you believe the presence of newspaper reporters and sketch artists affects the testimony of witnesses in a negative way?"

Approximately 29% responded affirmatively to this question.

48. The smale, a "modified Lickert scale," asked those questioned to respond to questions with response as follows: 1-Not at all, 2-Slightly, 3-Moderately, 4-Very and 5-Extremely.

The difference is not significant.[49] (Questions 24b, 25b and 26b.)

These statistics show that newspaper coverage of trials has an impact on the trial participants[50] not significantly different from that of other types of coverage allowed by the Florida access rule.[51]

Of course, the survey has weaknesses. It does not purport to address other comparisons which would be of interest. What difference in impact, for instance between sketch artists[52] and cameras? Between a micro-

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49. Trial participants were questioned about the effect of various type coverages on their desire to participate in a trial. (Questions 27-30.) The results can be understood from the following table of average response with a scale of "1" for "not at all" and "2" for "slightly."

| | Televised Trial | Photographed Trial | Radio Coverage of Trial | Newspaper Coverage of Trial |
|---|---|---|---|---|
| Juror | 1.3 | 1.3 | 1.2 | 1.2 |
| Witness | 1.63 | 1.55 | 1.45 | 1.5 |
| Court Personnel | 1.35 | 1.29 | 1.3 | 1.2 |
| Attorney | 1.74 | 1.6 | 1.5 | 1.6 |

50. The Florida Supreme Court did not survey trial judges, but relied on the survey of the Conference of Circuit Judges which produced less data, but similar results. That report concluded, "From the whole, I think Courts do not object to the use of cameras in the courtroom now that they have had some experience," 370 So.2d at 770.

51. No question was asked of attorneys or others about the impact of court reporters, League of Women Voters Court Watchers or other "outside" influences.

52. The appellants never address the subject of sketch artists. One technique to test the arguments on this issue is to substitute the words "sketch artist" (or "newspaper report") for "camera" in each statement made.

This is not to say that there are no differences but that the differences do not rise to dimensions significant for the argument now before the court. Some of the differences between cameras and sketch artists favor the camera. The distraction of a silent camera is far less than even a single sketch artist. In practice, as many as twelve or fifteen sketch artists have attended highly publicized trials in Florida.

(Continued on following page)

phone used by a court reporter and one used by a radio station?

The survey also does not attempt to measure the difference, if any, between the impact of, say, television coverage by multiple cameras on the courthouse steps or the halls of the courthouse from the impact of a single, silent, stationary camera in the courtroom.

These weaknesses do not, however, disqualify the study from use as an aid to the Florida court. Because that survey was but one of the tools used by the court in making its decision, we should accept it for what it is—an indication that trial participants who had experience with the access rule did not have significant objections to the access rule.[53]

## CONCLUSION

The Florida Supreme Court put the news organizations which sought access to a rigorous test in a proceeding lasting over four years and involving extensive briefing and reports, surveys and hundreds of trials and thousands of participants. The court made its decision allowing access based on the largest amount of information ever accumulated on this subject.

Before its final decision was rendered, the Florida court was able to draw on the experience of other states

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Footnote continued—

The potential for distortion through sketches is also greater because sketch artists, at times, engage in caricature, emphasizing the large nose, the mustache or other prominent features of trial participants. Some examples of courtroom sketches were placed before the Florida court in its *Post-Newsweek* proceedings. Additional examples are available if the Court wishes to have the record supplemented.

53. Moreover, for each possible slight detriment identified there was a corresponding slight possible benefit recorded. For instance, the court personnel and attorneys felt that jurors were slightly more self-conscious but also slightly more attentive, 370 So.2d at 769.

which had allowed access but, more importantly, it was able to rely on the extensive Florida experience with open institutions, accessible to all news organizations and, finally, on the direct experience with the many trials at which access had been allowed.

Each day in most large Florida communities, the sights and sounds of trial proceedings are transmitted to the public. The coverage is regular, without negative impact, and it is routinely accepted by the people of Florida. The coverage has had positive benefits by making the sensational trial more manageable and by increasing public awareness of issues within the judicial system. Moreover, there has been no evidence of adverse impact on the jury's verdict, and thus no infringement on the defendant's right to a fair trial.

The Florida Supreme Court acted responsibly in accepting the petition and allowing news organizations to demonstrate that they could utilize the modern technology without adverse impact on the business of the courts.

The appellants advance no reason that the careful efforts of the Florida courts should be repudiated.

The decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Rule 28.3 of the Supreme Court Rules, a copy of the foregoing Brief of Amici Curiae was served by United States Mail this 15th day of August, 1980 upon the following: Joel Hirschhorn, Esquire, Hirschhorn & Freeman, P.A., 742 Northwest 12th Avenue, Miami, Florida 33136 and Jim Smith, Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

NOEL CHANDLER AND ROBERT GRANGER,
*Appellants,*

v.

STATE OF FLORIDA,
*Appellee.*

On Appeal From The
Supreme Court Of The State of Florida

## JOINT BRIEF FOR AMICI CURIAE RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, AMERICAN BROADCASTING COMPANIES, INC., AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL-CIO), AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS BROADCASTERS, INC., ASSOCIATED PRESS MANAGING EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCAST EDITORIAL ASSOCIATION, NATIONAL BROADCASTING COMPANY, INC., NATIONAL NEWSPAPER ASSOCIATION, NATIONAL PRESS CLUB, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NATIONAL PUBLIC RADIO, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

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IN THE

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RADIO TELEVISION NEWS DIRECTORS ASSOCIATION,
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NATIONAL PUBLIC RADIO,
THE REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS, AND
SOCIETY OF PROFESSIONAL JOURNALISTS,
SIGMA DELTA CHI**

## INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of Appellee, State of Florida. It is accompanied by the written consents of Appellants and Appellee.

These *amici curiae* are national organizations that together represent a broad spectrum of working journalists, broadcast stations and networks, newspapers, and others directly involved in the gathering and dissemination of news to the public. Many of these organizations or their members have experience in the electronic and photographic coverage of courtroom proceedings, including criminal trials.

*Amici curiae* have strongly advocated the First and Sixth Amendment interests in the public's direct monitoring of judicial proceedings through audio-visual means. The National Association of Broadcasters and the Radio Television News Directors Association filed a brief *amici curiae* in the case of *Estes v. Texas,* 381 U.S. 532 (1965), which presented this general issue. RTNDA has also prepared and distributed a "Guide to Broadcasting from the Courtroom: A Compilation of Legal Materials Regarding Coverage of Judicial Proceedings by the Electronic Media" (looseleaf, unpublished), co-sponsored by The Reporters Committee for Freedom of the Press.

## SUMMARY OF ARGUMENT

### I.

Careful use of cameras and microphones to provide public reports of criminal trials does not violate defendants' right to a fair trial. The constitutional values of a free press and a public trial would be curtailed unnecessarily by the blanket exclusion of audio-visual equipment used by the news media to enlarge public scrutiny and understanding of criminal trials.

In *Richmond Newspapers, Inc. v. Virginia,* 48 U.S.L.W. 5008 (U.S. July 2, 1980) (No. 79-243), this

Court forcefully reiterated the desirability of the widest possible public review of criminal trials and proclaimed the First Amendment right of the print and electronic media to gather news for that purpose. Because the use of cameras and microphones makes possible the most direct and credible reporting of trials, Appellants have a heavy burden in attempting to show that this form of news gathering and dissemination is violative of their rights.

Where as here defendants cannot demonstrate that news media coverage created a real probability of prejudice to the fairness of the trial, the Court should not assume that defendants have been deprived of the due process of law guaranteed by the Sixth and Fourteenth Amendments. This is consistent with the due process standard applied by the Court in other criminal cases in which defendants have alleged that prejudicial publicity deprived them of their constitutional rights.

In *Estes v. Texas,* 381 U.S. 532 (1965), the case principally relied upon by Appellants, the Court was influenced by the physical and psychological disturbance allegedly caused by the intrusive presence of a great quantity of electronic and photographic equipment and personnel during pretrial proceedings. Much of the rationale of the *Estes* majority has been undercut by changes in the technology involved and by the public's (including trial participants') perception of the news media. Even in 1965, the dissenting Justices thought the presumption should be in favor of the First Amendment interests, and they contested what they saw as the majority's willingness to elevate speculative fears to the level of constitutional doctrine.

## II.

The States have shown increasing awareness of the importance of audio-visual coverage to greater public

understanding of the courts. The *Estes* Court thought it significant and perhaps crucial to its decision that only two States then permitted such coverage. Today, more than half of the States either have permanent rules or have experimented with some form of news media audio-visual coverage from the courtroom. Twenty-one States have permitted such coverage of criminal trials; 13 States have permitted such coverage over the defendant's objection.

No State which has permitted coverage has found that it interferes with the due process of law. The Conference of Chief Justices voted overwhelmingly for the proposition that each State should establish its own standards for any such coverage. All of this activity in the "laboratory" of the States, under court rules and guidelines, is affirmative testimony from the highest State courts that they believe a fair trial is not thwarted by carefully regulated audio-visual coverage.

## ARGUMENT

### I. THE NEWS MEDIA'S AUDIO-VISUAL COVERAGE OF A CRIMINAL TRIAL IS NOT A *PER SE* VIOLATION OF A DEFENDANT'S RIGHT TO A FAIR TRIAL

Appellants point to no specific prejudice created by the presence of cameras during their trial and do not argue that audio-visual coverage either disrupted their trial or transformed it into a spectacle.[1] Nevertheless, they argue

[1]"Audio-visual coverage," when used in this brief, refers to the use of (1) electronic cameras and microphones in the courtroom for the broadcast of the proceedings or excerpts thereof by radio and television stations to the general public; and (2) photographic cameras in the courtroom for the taking of still pictures used primarily in the print media. Under Florida rules, only one small electronic camera and one small photographic camera are permitted in the courtroom, with facilities elsewhere in the courthouse for news media pooling of the audio-visual product.

that such coverage denied them the fair trial guaranteed by the Sixth and Fourteenth Amendments. This result, they contend, is required by the Court's holding in *Estes v. Texas,* 381 U.S. 532 (1965), and by general constitutional principles of fair trial.

The facts of this case, the practices of the States, and the Court's construction of the First, Sixth, and Fourteenth Amendments support the opposite conclusion. The opinions supporting the Court's judgment in *Richmond Newspapers, Inc. v. Virginia,* 48 U.S.L.W. 5008 (U.S. July 2, 1980) (No. 79-243), must be read to have created at least a presumption in favor of this kind of news gathering that facilitates the widest and most direct public review of criminal trials.

### A. The *Estes* Decision Should Not Be Read to Bar Audio-Visual Coverage Today

The *Estes* holding should not control the outcome of this case. *Estes* was a different case factually and was decided at a time when television not only was technologically different, but also, and perhaps more importantly, was perceived differently than it is now. In addition, the *Estes* majority reached conclusions about certain legal issues and psychological effects that on the available facts today are clearly incorrect and were even adjudged otherwise then by the four dissenting Justices.

This part of our brief will focus on two factors that were highly significant to the *Estes* majority: the almost-unanimous practice of the States in prohibiting television and photographic coverage in the mid-1960's, and the Court's premise that it must "take the facts as they are presented today" and could not rest its judgment on "the

hypothesis of tomorrow."[2] Much has happened since 1965 in both of these areas that requires reconsideration of the issues in *Estes,* particularly in view of the Court's heightened recognition of the valuable role performed by the print and electronic media in covering criminal trials as "surrogates for the public" not in attendance.[3]

In his opinion for the Court in *Estes,* Mr. Justice Clark noted three times that only two States then permitted the televising and photographing of a criminal trial. The Court said that "[t]his is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence."[4] Elsewhere, the Court said that "[t]his fact is most telling in buttressing our conclusion that any change in procedure which would permit its [television's] use would be inconsistent with our concepts of due process in this field."[5] The same point is made in the concurring opinions of Mr. Chief Justice Warren[6] and Mr. Justice Harlan.[7]

Today there are 21 States that permit coverage of criminal trials under various restrictions, and a total of 28 States that have allowed various kinds of coverage of court proceedings. In Argument II of this brief, we describe and discuss in detail the developments in the States that have radically changed the situation that was thought so important by the *Estes* Court.

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[2]381 U.S. at 552. "When the advances in these arts permit reporting. . . by television without their present hazards to a fair trial we will have another case." 381 U.S. at 540.

[3]*Richmond Newspapers,* 48 U.S.L.W. at 5013 (opinion of Burger, C.J.), discussed at Argument I(B), *infra.*

[4]381 U.S. at 540.

[5]*Id.* at 544. *See also id.* at 550.

[6]*Id.* at 580-81.

[7]*Id.* at 594.

The other major change from the Court's premises in 1965 is the nature of audio-visual coverage itself. The Court generalized about this kind of media coverage from the specific manifestation of it at the *Estes* trial.[8] The *Estes* experience and the obtrusive circumstances criticized by the Court are, however, far removed from the present situation in which only a single, small electronic camera and a single, smaller photographic camera are permitted to cover trials in Florida under established statewide rules. These rules limit the use of microphones and lighting to equipment already in place for the court's purposes. Cameras are noiseless and harsh lighting and bulky cables have been eliminated. These rules also include restrictions on coverage that remove the burdensome need for continuous and distracting supervision by the judge during the trial.[9] Both the technology and the care in its use in the

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[8]The *Estes* majority placed great emphasis on the pretrial hearing at which physical and psychological disturbance was caused by the obtrusive presence of electronic and photographic equipment and personnel. 381 U.S. at 536-37, 550-51. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 552 (1976), where the decision in *Estes* was described as the product of an atmosphere of spectacle and failure of the trial judge to maintain control of the proceedings. Similarly, in Murphy v. Florida, 421 U.S. 794, 798-99 (1975), the inflammatory circumstances surrounding the trial in *Estes* were cited as the reason for the Court's dispensing with a particularized showing of prejudice.

[9]*See* Florida's Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings (Appendix 3 to the Florida Supreme Court's final opinion in Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 792-94 (1979)). One of the fears expressed by the *Estes* majority was that judges would become so involved in coverage issues (*e.g.*, types of permissible equipment and their positioning) that they would lose sight of their judicial obligations. 381 U.S. at 551; *see also* 381 U.S. at 565, 568-69 (Warren, C.J., concurring). This fear has been allayed by the practice of requiring approval of coverage plans prior to any coverage and applicable to all future coverage, by requiring pool coverage, and through the use of media coordinators as administrators

courtroom have improved to the point where there is clearly no probability of prejudice. See other *amici curiae* briefs in support of Appellee for further discussion of the state of the art in broadcast and photographic technology.

Similarly, the public's perception of television, radio, and other media coverage of news events, including court news, has changed. The *Estes* Court suggested that the mere knowledge by trial participants and the public that a trial is important enough to be reported in this manner is sufficient to prejudice the defendant's right to a fair trial.[10] If this were ever so, it certainly is not so now. Television coverage of ordinary news events is now so well established that the presence of a television camera in a public place suggests nothing more unusual than does the presence of a newspaper reporter or sketch artist, a common occurrence in courtrooms.

If, as is so, reporters can take notes and artists can sketch trial participants without creating distractions and fears that would deprive a defendant of a fair trial,[11] there are no constitutional grounds for different treatment of a person with a camera when he is under careful controls.[12]

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for these plans. Thus, the courts – except for routinely monitoring compliance with the plans – are removed from administering the details of coverage.

[10]381 U.S. at 545-47, 549-50.

[11]*See* United States v. Columbia Broadcasting System, Inc., 497 F.2d 102 (5th Cir. 1974).

[12]Further analysis of the *Estes* decision is contained in Argument I(C), *infra*.

### B. Audio-Visual Coverage Promotes the First and Sixth Amendment Interests in Public Scrutiny of Criminal Trials

This Court has frequently held that dissemination of information concerning criminal trials serves the purpose of the Sixth Amendment's guarantee of a public trial. The right to a public trial

> "has always been recognized as a safeguard against any attempt to employ the courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

*In re Oliver,* 333 U.S. 257, 270 (1948). Similarly, in *Sheppard v. Maxwell,* 384 U.S. 333, 349 (1966), the Court said that the guarantee of a public trial is based on the "principle that justice cannot survive behind walls of silence." The press "guards against the miscarriage of justice by subjecting police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* at 350. And in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975), the Court reaffirmed the particular importance of the press — in that case the broadcast press — in guaranteeing fair trials.

Now, in *Richmond Newspapers,* the Court has made its strongest statements yet about the importance of press trial coverage, recognizing a First Amendment "right of access" to criminal trials that overcomes a defendant's objection "absent an overriding interest articulated in findings."[13] In addition to reaffirming the traditional

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[13] 48 U.S.L.W. at 5015 (opinion of Burger, C.J.); *see id.* (Stevens, J., concurring).

values ascribed to open trials,[14] the Court, through its plurality and concurring opinions, emphasized that the press performs a special, representative role in providing information — necessary to realization of the aforementioned public trial values — to the growing public that cannot personally attend trials. The Chief Justice stated:

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . .' *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 587 (BRENNAN, J., concurring)."[15]

These are also strong arguments for audio-visual coverage of court proceedings because such coverage enlarges the public that can directly observe the trial. The coverage, being direct, is more credible because the

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[14]E.g., assurance that the proceedings are conducted fairly; support for judicial remedies; legal education; check on government power; discouragement of perjury and other misconduct of participants; enhancement of the performance of participants; and therapeutic value in community reaction to shocking crime. *See id.* at 5014 (opinion of Burger, C.J.); *id.* at 5018 (Brennan, J., concurring).

[15]*Id.* at 5013 (opinion of Burger, C.J.); *accord, id.* at 5020 & n.3 (Stewart, J., concurring); *id.* at 5016 n.2 (Brennan, J., concurring).

possibility of erroneous or subjective reporting is eliminated or reduced, depending on whether the trial is broadcast in whole or in part. Such direct trial coverage is by definition more realistic and vivid than written or spoken descriptions and sketches by the news media. Authentic courtroom coverage also serves to dispel exaggerated notions of trials which are fostered by television drama and other fictional accounts of trials.[16]

Mr. Justice Brennan observed in *Richmond Newspapers* that "the availability of a trial transcript is no substitute for a public presence at the trial itself."[17] Similarly, the availability of print and broadcast reports, as informative as they are, is no substitute for direct public monitoring of trials when the proceedings are carried in whole or part by radio and television.

The Court in *Richmond Newspapers* did not consider the "conceptually separate, yet related question" of "whether the media should enjoy greater access rights than the general public," as Mr. Justice Brennan noted in his concurring opinion. "As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."[18]

In that representative role, the press is accorded courtroom accommodations that other members of the public do not have. In this connection, it is not without significance that most Americans now receive most of their

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[16]*See TV on Trial: It Affects Jurors in Court and Out*, The Washington Post, July 8, 1980, at A6.

[17]48 U.S.L.W. at 5019 n.22 (Brennan, J., concurring).

[18]*Id.* at 5016 n.2 (Brennan, J., concurring).

news from radio and television.[19] It is consistent with their special and "fitting" status that the news media are being permitted in increasing numbers of States to use equipment in the courtroom that allows the great public not in attendance to observe trial proceedings first-hand through radio and television.[20]

The need for this modern practice of audio-visual news coverage of trials can be better appreciated when it is realized, as did the plurality in *Richmond Newspapers,* that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."[21] In such matters, it would appear that there is "a First Amendment right [of the public] to 'receive information and ideas,'"[22] and this right might be infringed if the news media are not permitted to cover trials in the most in-

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[19]The Roper Organization, Inc., Public Perceptions of Television and Other Mass Media: A Twenty-Year Review 1959-1978 (1979).

[20]"To work effectively, it is important that society's criminal process 'satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it." 48 U.S.L.W. at 5012 (opinion of Burger, C.J.).

Mr. Chief Justice Burger's opinion recounted English common law history that establishes the purpose of the law that "'all men may heare from the mouth of the depositors and witnesses what is saide.'" T. Smith, DE REPUBLICA ANGLORUM 101 (Alston ed. 1972), *quoted at* 48 U.S.L.W. at 5011.

[21]48 U.S.L.W. at 5013 (opinion of Burger, C.J.); *see also id.* at 5018, 5019 (Brennan, J., concurring): "It follows that the conduct of the trial is preeminently a matter of public interest."

[22]Kleindienst v. Mandel, 408 U.S. 753, 762 (1972), *quoted in Richmond Newspapers,* 48 U.S.L.W. at 5013 (opinion of Burger, C.J.); *see also id.* at 5020 n.2 (Stewart, J., concurring); *id.* at 5016 n.3 (Brennan, J., concurring).

formative manner, assuming no overriding interest to the contrary.

*Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), is also strongly supportive of the access being granted to the press in Florida and elsewhere for the limited and controlled use of electronic and photographic equipment. In *Houchins,* a sheriff's office had denied media access to a notorious portion of the county jail, except through limited guided tours at which cameras and microphones were prohibited. Although the Court vacated an injunction requiring very broad access to the jail, a majority of the Court would have voted to permit the press to use cameras and microphones on the tours provided for the public, agreeing that the First and Fourteenth Amendments give the press a special role to play in American society. [23] Mr. Justice Stewart said:

> "The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively. A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are

[23] 438 U.S. at 17 (Stewart, J., concurring), 39 n.36 (Stevens, J., dissenting, joined by Brennan and Powell, JJ.).

there to convey to the general public what the visitors see."[24]

In *Estes*, the four dissenters argued for a presumption in favor of accommodating First Amendment interests:

> "The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.
>
> "While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of

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[24] *Id.* at 17. The reasoning in Mr. Justice Stewart's opinion in *Houchins* would support an argument that the First and Fourteenth Amendments require admission of news media equipment for the coverage of criminal trials in the absence of substantial reasons for not permitting it under appropriate controls. *See also* Mr. Justice Brennan's question and other discussion above, in connection with *Richmond Newspapers*, about whether the media should enjoy greater access than the general public; and *Estes*, 381 U.S. at 614-15 (Stewart, J., dissenting), set forth in the text immediately hereinafter. If the Court is otherwise in agreement with our argument in this brief, it need not address itself to the question of a First Amendment *right* to provide audio-visual coverage, because Florida has permitted such coverage pursuant to a petition initiated by the news media and under rules that the news media have not challenged.

> First Amendment freedoms. See *Speiser v. Randall,* 357 U.S. 513, 525. And the proposition that nonparticipants in a trial might get the 'wrong impression' from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the 'essential requirement of the fair and orderly administration of justice,' '[f]reedom of discussion should be given the widest range.' *Pennekamp v. Florida,* 328 U.S. 331, 347. . . ."[25]

This position, we submit, received strong support in *Richmond Newspapers.*[26] To fulfill their reporting function, television and radio journalists and still photographers require use of equipment – the tools of their trade – which are essential to their reporting of this public event.[27] To place photographers and electronic journalists on a par with print reporters in their ability to communicate through their respective media, Florida has allowed carefully regulated access to trials by audio-visual equipment. The presumption argued by the *Estes*

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[25]381 U.S. at 614-15 (Stewart, J., dissenting).

[26]*E.g.,* 48 U.S.L.W. at 5013 (opinion of Burger, C.J.): "[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice."

[27]"The trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. 367, 374 (1947). This case, which involves a question of the means permissible for the dissemination of information already available to the general public in the courtroom, is thus unlike the access question raised in Pell v. Procunier, 417 U.S. 817 (1974), in which the Court held that news reporters have no constitutional right of access to prisons or their inmates if the general public has no such right or opportunity. In *Houchins,* Mr. Justice Stewart's concurring opinion recognized that distinction.

dissenters and reflected in the opinions in *Richmond Newspapers* supports Florida's grant of access for all news media in the absence of special circumstances demonstrating prejudice.

Finally, the teaching of *Richmond Newspapers* about the strength of our society's commitment to open and publicized trials necessarily means that certain minimal risks will be accepted in order to vindicate the public's right to acquire the most meaningful information. This is true, of course, with respect to the exercise of other First Amendment rights.

In order for this Court to conclude – despite the resulting substantial harm to the First Amendment interests of the public – that the presence of cameras and microphones is a *per se* denial of due process of law, the Court would have to find that the presence of such equipment has an impact on trials so adverse and so different from the effect of note-taking reporters, sketch artists, and the public generally that a fair trial cannot be had. As we show below, no such finding can be made under this Court's established standards.

### C. Appellants' Claims Do Not Support a Constitutional Ruling Prohibiting Audio-Visual Coverage of Criminal Trials

The absence of ascertainable or probable prejudice starkly separates this case from the Court's holdings in *Estes* and other cases in which pretrial publicity has been deemed to have prevented fair trials. *See, e.g., Sheppard v. Maxwell, supra; Rideau v. Louisiana,* 373 U.S. 723 (1963); *Irvin v. Dowd,* 366 U.S. 717 (1961). In *Nebraska Press Association v. Stuart,* 427 U.S. 539, 551-52 (1976), and *Murphy v. Florida,* 421 U.S. 794, 798-99 (1975), the

Court noted that each of its trial publicity cases had involved either actual prejudice to the defendant's right to a fair trial, or inflammatory circumstances coupled with a lack of judicial control from which prejudice could be inferred.

In the absence of any identifiable prejudice, the Appellants' speculative claims of unfairness should be denied. Unlike the impact discerned by the Court in the pretrial proceedings in *Estes*, the presence of cameras in this case did not demonstrably interfere with the judicial atmosphere to the point of creating a "probability" of prejudice.[28] As the dissenters argued in *Estes* (381 U.S. at 615) and as follows from the thrust of the majority's opinions in *Richmond Newspapers*, particularly because First Amendment interests are at stake the defendant has a burden of demonstrating sufficient cause requiring the exclusion of audio-visual coverage. Appellants have not attempted to meet their burden. In such a situation, Florida's decision to permit audio-visual coverage of a trial which would otherwise be covered by reporters and artists presents no questions which rise to a constitutional level.

The fears of prejudicial television coverage expressed by the majority in *Estes* have either been obviated by advances in technology or pose problems no different than those already faced by judges in any controversial trial in dealing with reporters generally.[29] Among the concerns

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[28]The *Estes* Court relied upon *In re* Murchison, 349 U.S. 133, 136 (1955), to support its argument that isolable prejudice need not be shown if a state's procedure involves such a "probability" of prejudice that the procedure is "deemed inherently lacking in due process." 381 U.S. at 542-43.

[29]A study by Florida's Office of the State Courts Administrator showed that trial participants were not affected by the presence of television any more than by the presence of newspaper reporters. "A

highlighted by Mr. Justice Clark was possible prejudice if only notorious trials were televised, alerting jurors and other participants to the unusual nature of a case. With the spread of rules like Florida's permitting routine coverage, broadcast programming has included material from all kinds of courts about all kinds of cases – civil and criminal, notorious and obscure. Thus, television and photographic coverage is increasingly recognized as ordinary.

Moreover, because the average criminal trial does not have widespread attendance or extensive print media coverage, a contingent of reporters and artists is as sure a sign of public interest as is a single camera. Hence, if a trial is a subject of popular interest, it is not the incremental presence of audio-visual equipment which alerts the jury and witnesses to this fact.[30] Since this Court has repeatedly determined that trial judges are able to defuse prejudice by carefully controlling the presence of news personnel in the courtroom and sequestering and instructing the jury if necessary, coverage by cameras and micro-

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Sample Survey of the Attitudes of Individuals Associated With Trials Involving Electronic Media and Still Photography Coverage In Selected Florida Courts Between July 5, 1977 And June 30, 1978," Section I, questions 19-30.

[30]The use of pool cameras for courtroom coverage as required in Florida further minimizes any intrusion into court proceedings. The presence of these cameras is unobtrusive, and the pool system eliminates the distraction of broadcast reporters and photographers who would otherwise be entering and leaving the courtroom. Indeed, many print reporters may choose to cover a trial from a monitoring room outside the courtroom, which further reduces the perceived level of press interest in a case. Allowing audio-visual coverage of trials also reduces the crowding at courthouse entrances of reporters and cameramen seeking access to trial participants. Pool coverage occurs under pre-arranged rules, and the product is available to all media organizations.

phones cannot be presumed to substantially affect defendants' rights.[31]

Similarly, other problems identified in *Estes* are equally present with print reports and equally subject to control by trial judges. For example, a witness who could see the testimony of previous witnesses on television (381 U.S. at 547) could read about the testimony in the newspaper or hear it quoted on a news broadcast. Indeed, such reports might be less accurate than presentation of the actual trial by picture and sound. There is no reason to believe that the means now used to shield juries from such influences will be less effective if coverage is direct or taped for broadcast instead of by print quotation or paraphrase.

As the briefs of Appellee and other *amici curiae* demonstrate, the Supreme Court of Florida carefully evaluated the possibilities of prejudice to defendants' rights, both when it authorized the experiment under

[31] In *Sheppard v. Maxwell*, the Court suggested these and several other procedures available to trial judges to protect criminal proceedings from undue press influence. 384 U.S. at 358-62. Where appropriate, these measures are available to ensure that trials are not disrupted or harmed by press coverage of any kind. Mr. Chief Justice Burger emphasized this point in his opinion for the Court in *Nebraska Press Association* during the course of his discussion of the Hauptmann trial:

> "Criticism was directed at the 'carnival' atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession – including other judges – pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court." 427 U.S. at 549.

*See Richmond Newspapers*, 48 U.S.L.W. at 5011, 5015 (opinion of Burger, C.J.): "All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here [to support closing the trial] was beyond the realm of the manageable."

which Appellants' trial was covered and when it established a permanent rule. It found no evidence of any meaningful prejudicial effect, and its judgment has been supported by the judiciary in 20 other States which have authorized audio-visual coverage of criminal trials. Their experience is discussed below.

## II. THE PRACTICES OF OTHER STATES CONFIRM THE VALIDITY OF FLORIDA'S CONCLUSION THAT AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS IS NOT *PER SE* PREJUDICIAL

In assessing the constitutionality of Florida's rules on audio-visual coverage of court proceedings, the Court should also examine the practices of other States. As Mr. Justice Clark stated for the Court in *Leland v. Oregon,* 343 U.S. 790, 798 (1952):

> "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, 1934, 291 U.S. 97, 105."

*See also McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971) (opinion of Mr. Justice Blackmun announcing the judgments of the Court). A thorough review of the policies of other States reveals that Florida's audio-visual courtroom coverage is neither abnormal nor offensive to any fundamental principle of justice.

At the time of the *Estes* decision, only Texas and Colorado clearly permitted audio-visual coverage of criminal

trials.[32] The *Estes* majority was plainly disturbed and heavily influenced by the fact that the proceedings in that case ran counter to traditional practices endorsed by the American Bar Association,[33] by the federal courts,[34] and by an overwhelming number of the States. *Estes,* 381 U.S. at 540, 544, 550 (opinion of Clark, J. for the Court), 580-81 (Warren, C.J. , concurring), and 594 (Harlan, J., concurring).

As discussed above, since the *Estes* decision, important technological advances and the decreasing novelty of the

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[32]*Estes,* 381 U.S. at 580-81 & nn. 38-39 (Warren, C.J., concurring). The situation in Oklahoma was unclear. *Id.* at 580 n.38.

[33]The Appendix to Mr. Justice Harlan's concurring opinion in *Estes* quotes the ABA's *amicus curiae* brief tracing the involvement of the ABA in this issue. 381 U.S. at 596-601. Since *Estes,* the ABA has abandoned Canon 35 and adopted a Code of Judicial Conduct which includes Canon 3A(7) on this subject. Canon 3A(7) is set forth in Appendix A hereto.

Although far more restrictive than the Florida practice at issue in the case at bar, ABA Canon 3A(7) does, at least, constitute endorsement of the view that the presence of audio-visual equipment in the courtroom is not inherently disruptive, distracting, or prejudicial. *See* note 34, *infra,* regarding implicit acceptance of this view by the Judicial Conference of the United States.

In 1978, the ABA's Adjunct Committee on Fair Trial – Free Press proposed a revised standard stating that audio-visual coverage was not *per se* inconsistent with the right to a fair trial. Although winning endorsements of various groups within the ABA, this proposed standard was not approved by the ABA House of Delegates at its mid-winter meeting in February, 1979. A complete description of the Adjunct Committee's activities is contained in the Florida Supreme Court's opinion in Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 771 (Fla. 1979).

[34]The bar to audio-visual coverage of the proceedings of federal courts has not changed appreciably since *Estes.* Rule 53 of the Federal Rules of Criminal Procedure prohibits audio-visual coverage of criminal proceedings. In addition, a series of pronouncements by

audio-visual media have resulted in altered attitudes. State judiciaries, in particular, are no longer willing to presume the existence of subjective prejudices arising from audio-visual courtroom coverage.

These changed attitudes are accurately reflected by the August 2, 1978 action of the Conference of Chief Justices in overwhelmingly approving (44-to-1 with one abstention) a resolution that ABA Canon 3A(7) should be modified to permit each State, through its highest court, to establish needed standards and guidelines for audio-visual courtroom coverage. *See Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d at 791-92.

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the Judicial Conference of the United States have dealt with the issue of audio-visual coverage of federal court proceedings and have resulted in the Conference's approval of ABA Canon 3A(7). Therefore, although the ban on audio-visual coverage of federal court proceedings remains, the Conference's toleration of ABA Canon 3A(7) contradicts the proposition of Appellants that the mere presence of audio-visual media is necessarily prejudicial. *See* note 33, *supra*. Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, pp. 8-9 (resolution condemning audio-visual coverage); Report of the Proceedings of the Judicial Conference of the United States, March 18-19, 1965, p. 11 (reaffirmation of 1962 resolution); Report of the Proceedings of the Judicial Conference of the United States, April 5-6, 1973, pp. 9-11 (noting that ABA Canon 3A(7), as then proposed, would *not* conflict with the 1962 and 1965 resolutions); Report of the Proceedings of the Judicial Conference of the United States, September 23-24, 1976, p. 44 (rejecting the request of the Radio Television News Directors Association that audio-visual coverage of naturalization and ceremonial proceedings in federal courts be permitted); Report of the Proceedings of the Judicial Conference of the United States, March 7-9, 1979, pp. 24-25 (amending Code of Judicial Conduct to permit audio-visual coverage of naturalization and ceremonial proceedings).

### A. The States Have Not Found *Estes* A Bar to Audio-Visual Coverage of Courtroom Proceedings

A survey of the rules of the 50 States and the District of Columbia reveals that *Estes* has not been construed as a bar to audio-visual coverage of courtroom proceedings.

A detailed narrative description of the rules of these jurisdictions and citations to those rules are contained in Appendix A. In Appendix B, we have classified the jurisdictions permitting coverage into several relevant categories.[35] The following discussion is based on this objective data.

In the wake of *Estes* and until 1974, only Colorado continued to permit audio-visual coverage of court proceedings. The Supreme Court of Washington in November, 1973 authorized experimental coverage of a trial, and this coverage eventually occurred in late 1974. From February 1, 1976 until the present – a period of only four and one-half years – 28 States, including Florida, have permitted some form of audio-visual coverage of their court proceedings.[36] Overall, 19 States

[35]These categories include: whether trial and/or appellate courts are covered; whether civil and/or criminal proceedings are encompassed; whether the rule is permanent or experimental; and the types of preconditions to coverage.

[36]Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York (one day experiment in New York Court of Appeals), North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wisconsin.

Sporadic audio-visual coverage has also occurred in several other States, including Arkansas, Indiana, and South Carolina, although not under any authorization from those States' highest courts or any state rule explicitly permitting coverage. Rather, this sporadic coverage has simply resulted from the decisions of individual judges to permit coverage in particular cases.

allow audio-visual coverage of both trial and appellate courts,[37] three have permitted trial coverage only,[38] and six have authorized appellate coverage only.[39] Moreover, the judiciaries of at least 12 other States are actively studying the possibility of audio-visual coverage of courtroom proceedings.[40]

The activities of these States reflect a rich variety of approaches in terms of the technical specifications and legal preconditions to coverage. Many States have undertaken experiments of limited duration; some of these have chosen to limit the experiment to particular geographic regions while others have preferred to obtain statewide experience. Some States require the consent of the parties and their counsel prior to any coverage; others permit but limit coverage if participants' consents are not obtained; still others allow full coverage absent the consents of participants. One common thread, however, binds all of these activities — in each instance, the courts have explicitly retained authority to terminate audio-visual coverage if it

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[37]Alabama, Alaska, California, Colorado, Florida, Georgia, Iowa, Louisiana, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Washington, and Wisconsin.

[38]Kentucky, Pennsylvania, and West Virginia.

[39]Arizona, Idaho, Minnesota, New York, North Dakota, and Texas.

[40]Arkansas, Connecticut, Delaware, Maine, Maryland, Mississippi, Missouri, Oregon, Rhode Island, South Dakota, Utah, and Vermont. Based on its abbreviated experiment, New York is considering expanded audio-visual coverage of courtroom proceedings. A petition requesting expansion of existing experimental coverage is also pending before the Pennsylvania Supreme Court.

proves distracting or disruptive or if it threatens the fairness of the judicial process.[41]

For purposes of the instant case, it is important to note that, of the 21 States which have permitted audio-visual coverage of criminal trials,[42] a majority (13 States) have chosen not to condition coverage of the proceedings upon the defendant's consent.[43] Florida is one of those States. Of those 13 States, 11 States, including Florida, allow coverage of the proceedings *and* the defendant without the defendant's consent.[44]

Moreover, the uncertainties and misinterpretations surrounding *Estes* have undoubtedly caused a number of other States to refrain from permitting any audio-visual coverage, to limit audio-visual coverage to appellate tribunals, to prohibit audio-visual coverage of all criminal proceedings, or to bar audio-visual coverage of criminal

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[41] *See, e.g.*, Green v. Florida, 377 So. 2d 193 (Fla. 3d Dist. Ct. App. 1979), where a conviction was reversed because the trial court, before permitting coverage, failed to hold an evidentiary hearing on the effect coverage would have had on the particular defendant's competency to stand trial.

[42] Alabama, Alaska, California, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Washington, West Virginia, and Wisconsin.

[43] Alaska, Florida, Iowa, Kentucky, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, Ohio, Washington, West Virginia, and Wisconsin.

[44] Alaska requires the criminal defendant's consent only to cover the defendant himself; it does, however, require counsel's consent in order to have any coverage whatsoever in trial proceedings. Like Alaska, Washington requires the defendant's consent only as a precondition to coverage of the defendant. The remainder of these States, including Florida, do not condition coverage of the proceedings or of the defendant on the defendant's consent.

trials unless the defendant consents. Indeed, this Court's notation of probable jurisdiction in the present case prompted one State (California) to withdraw its proposed experimental rule which would have permitted coverage of a criminal trial over the defendant's objection. The Court's review of this case has also affected the nature of an advisory committee's recommendations in another State (New York) and appears to have contributed to the temporary tabling of a coverage recommendation in yet another State (Oregon).

The activities of 21 States in permitting criminal trial coverage reflect reasoned and reasonable judgments that audio-visual coverage of these proceedings is simply not *per se* prejudicial. Perhaps the strongest evidence of the absence of prejudice from audio-visual coverage is the fact that, of the States which have permitted this coverage, not one has decided to reinstate a ban on it as the result of any prejudicial effects or other bad experiences.[45] The highest courts of those States would not allow such a practice with or without the defendant's consent if they thought it were inherently prejudicial.

This point was emphasized by the Ohio Supreme Court in *State ex rel. Grinnell Communications Corp. v. Love,* 62 Ohio St. 2d ____, ____ (June 18, 1980), in which that court issued a writ of mandamus directing the respondent

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[45]The present bar to audio-visual coverage in Kentucky resulted when the Kentucky Supreme Court decided to adopt, as an entirety, a Code of Judicial Conduct (including ABA Canon 3A(7)). Kentucky had previously lacked such a code. Thus, Kentucky's current prohibition on audio-visual coverage resulted from adoption of that code rather than from any study of – or ill effects arising from – the audio-visual coverage which was allowed in the Jefferson Circuit Court.

trial judge to permit audio-visual coverage absent a disqualifying factor under Ohio's experimental Canon:

> "This reasoning [respondent's argument that the effects of coverage are unknown and must be presumed to have an adverse impact on a fair trial] ignores a necessary, albeit tacit, presumption underlying the adoption by this court of the Canon and Rule of Superintendence concerning media coverage. By adopting them in their present form, this court has posited that it is presumed that news coverage of a court proceeding is *not per se* inconsistent with a fair and impartial trial. This is a *sine qua non* for this court to have approved such coverage. On the other hand, it is precisely this presumption of fairness that the lower court has questioned and found to be lacking. . ., but it is its responsibility to scrutinize the case before it to see if any of the factors which rebut this presumption is present."

As shown in Argument I, *supra,* these are the types of judgments which the States are entitled to make absent probable prejudice of constitutional dimension resulting from the presence of the audio-visual media in the courtroom. These independent judgments of the States strongly support Florida's position that fundamental notions of due process are not offended by properly regulated media coverage.

### B. Florida's Rule on Courtroom Coverage Is Well Within the Bounds Permitted States Under a Federal System

Innovations by the States in the area of courtroom coverage demonstrate the advantages of the pluralism and

experimentation permitted by our federalism. In refusing to agree in *Estes* to any flat constitutional prohibition on audio-visual courtroom coverage, Mr. Justice Harlan emphasized (381 U.S. at 587):

> "Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation."

The benefits of federalism and the States' constitutional abilities to initiate change have long been recognized by this Court. In *Whalen v. Roe,* 429 U.S. 589, 597 n.20 (1977), for instance, Mr. Justice Stevens underscored this proposition for a unanimous Court:

> "Mr. Justice Brandeis' classic statement of the proposition merits reiteration:
>
> 'To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. *It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.* This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. *But in the exercise of*

> *this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.* If we would guide by the light of reason, we must let our minds be bold.' *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (dissenting opinion) (footnote omitted)." (Emphasis added.)

It seems particularly appropriate, in this context as well as that of *Richmond Newspapers,* that the States should be recognizing and fostering modern means for the dissemination of information so vital to the American public. *See PruneYard Shopping Center v. Robins,* 48 U.S.L.W. 4650 (U.S. June 9, 1980) (No. 79-289).

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Florida should be affirmed.

Respectfully submitted,

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# Appendices

# APPENDIX A

## Narrative Description of State Rules on Coverage of Courts by Electronic and Photographic Media

In this Appendix, the *amici curiae* describe the courtroom coverage rules of the 50 States and the District of Columbia and, where possible, furnish official citations to those rules. For purposes of this Appendix, the term "coverage" refers to audio and/or visual coverage of courtrooms by the electronic media and still photographers — whether on behalf of television, radio, or the print media — for news purposes. To the best of our knowledge and belief, these descriptions of rules are objective and accurate as of August 1, 1980.

A number of allusions are made in this Appendix to similar American Bar Association ("ABA") provisions on courtroom coverage regulation. This is done as a shorthand means of describing State rules. Canon 3A(7) of the ABA Code of Judicial Conduct is set forth at the end of this Appendix. Descriptions of the coverage rules of the 50 States and the District of Columbia follow.

(1) *Alabama* — On December 15, 1975, the Supreme Court of Alabama adopted Canons of Judicial Ethics to be effective February 1, 1976. Canon 3A(7A) and (7B) provides that trial and appellate courtroom coverage is permissible if the Supreme Court of Alabama has approved a plan for the courtroom in which coverage will occur. The plan must contain certain safeguards to assure that coverage will not detract from or degrade court proceedings, or otherwise interfere with a fair trial. If such a plan has been approved, a trial judge may, in the exercise of "sound discretion", permit coverage if: (1) in a criminal

proceeding, all accused persons and the prosecutor give their written consent and (2) in a civil proceeding, all litigants and their attorneys give their written consent. Following approval of their coverage plans, appellate courts may authorize coverage if the parties and their attorneys give their written consents. In both trial and appellate contexts, the court must halt coverage during any time that a witness, party, juror, or attorney expressly objects. In an appellate setting, it must also halt coverage during any time that a judge expressly objects to coverage. *Authority:* Canon 3A(7), 3A(7A), and 3A(7B), Alabama Canons of Judicial Ethics, ALA. CODE, Vol. 23 (Rules of the Alabama Supreme Court).

(2) *Alaska* – By order No. 324 (August 24, 1978), the Alaska Supreme Court permitted experimental coverage of the proceedings of the Supreme, Superior, and District Courts in the Anchorage court facility effective September 15, 1978. By Order No. 387 (September 27, 1978), the Alaska Supreme Court amended Canon 3(A)(7)(c) of the Alaska Code of Judicial Conduct to permit coverage of trial and appellate proceedings effective November 1, 1979. Prior to such coverage, a plan must be approved by the Supreme Court and must include safeguards to ensure that coverage will not distract participants, impair the dignity of court proceedings, or interfere with a fair trial. For trial proceedings, permission for coverage must be expressly granted by the judge and by the attorneys for all parties. Witnesses, jurors, or parties who object shall neither be photographed nor have their testimony broadcast or telecast. For coverage of Supreme Court proceedings, only the permission of the Court is required. *Authority:* Canon 3(A)(7), Alaska Code of Judicial Conduct, Alaska Rules of Court Procedure and Administration, Vol. IIA.

(3) *Arizona* – Canon 3(A)(7) of the Arizona Code of Judicial Conduct parallels the current ABA Canon. By order dated April 16, 1979, however, the Supreme Court of Arizona suspended this Canon to permit coverage of its proceedings and the proceedings of the State Courts of Appeals for the one-year period beginning May 31, 1979 and ending May 31, 1980. Subsequently, by order dated April 22, 1980, this experimental coverage was extended for one year (until May 31, 1981). Under this experiment, coverage must not detract from the dignity of court proceedings. *Authority:* Canon 3(A)(7), Arizona Code of Judicial Conduct, adopted by Rule 45, Rules of the Arizona Supreme Court, ARIZ. REV. STAT., Vol. 17A (as modified by above-referenced orders).

(4) *Arkansas* – Canon 3(A)(7) of the Arkansas Canons of Judicial Ethics follows the current ABA Canon. The Arkansas Bar Association has petitioned the Arkansas Supreme Court for a coverage plan requiring the consent of all parties and attorneys as well as the court. *Petition of Arkansas Bar Association for Modification of Code of Judicial Conduct,* No. 79-307. Witnesses would not be depicted or recorded unless their consents were obtained; jurors would not be covered at all. On November 5, 1979, the Arkansas Supreme Court requested comments on this proposal which had resulted from a report of the Arkansas Bar Association's Special Committee on Cameras in the Courtroom. The Chief Justice of the Arkansas Supreme Court has stated that the Court intends to act on the petition before the end of 1980. Several Arkansas trial judges, including Faulkner Circuit Judge George F. Hartje, Jr. and Little Rock Circuit Judge Lowber Hendricks, have permitted coverage of certain courtroom proceedings. *See also Moore v. State,* 229 Ark. 335, 315 S.W.2d 907 (1958)

(motion for continuance of trial not warranted where media photographed trial from outside the courtroom). *Authority:* Canon 3A(7), Arkansas Canons of Judicial Ethics, Supreme Court of Arkansas Manual of Rules and Committees (Judicial Department of Supreme Court of Arkansas).

(5) *California* – Rule 980 of the California Rules of Court forbids coverage; Rule 980.1 of those rules permits coverage studies if approved by the California Judicial Council. On May 10, 1980, the Judicial Council of California added Rules 980.2 and 980.3 to permit experimental coverage and experimental educational coverage of trial and appellate courts in California for the period July 1, 1980 through June 30, 1981. These rules were the result of a prolonged study conducted prior to and after the Judicial Council of California had, on December 2, 1978, approved the concept of a one-year experimental coverage program. Under the rules, the coverage must not be distracting or interfere with court proceedings. The judge must consent to coverage and, in trial court proceedings in criminal cases, written consents of the prosecutor and defendant must be obtained. The court may exercise its discretion concerning coverage of objecting witnesses. Due to the notation of probable jurisdiction by the Supreme Court of the United States in *Chandler v. Florida,* the Judicial Conference of California amended these experimental rules in two respects. First, it delayed the beginning of the experiment by one month. Second, it amended Rule 980.2 to require the consent of the defendants and the prosecutors in criminal trial proceedings. *Authority:* Rules 980, 980.1, 980.2, and 980.3, California Rules of Court, CAL. [Civil and Criminal Court Rules] CODE, Vol. 23, Part 2, 1979 Supp. Pamph. (West).

(6) *Colorado* – Canon 3(A)(7) through (10) of the Colorado Code of Judicial Conduct permits coverage of trial

and appellate courts in Colorado. These rules were the result of hearings ordered by the Colorado Supreme Court on December 12, 1955. Following hearings in late January and early February, 1956, the referee (Justice Otto Moore) issued a report. That report, dated February 20, 1956, favored coverage and was adopted by the Colorado Supreme Court on February 27, 1956. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics,* 132 Colo. 591, 296 P.2d 465 (1956). Coverage must not detract from the proceedings, degrade the court, distract witnesses, or otherwise interfere with a fair trial. Trial judges may permit coverage by order. No coverage is permitted of criminal proceedings unless the defendant consents. Also, no witness or juror in attendance under court order or by subpoena shall be covered if he or she expressly objects. *Authority:* Canon 3(A)(7), 3(A)(8), 3(A)(9), 3(A)(10), Colorado Code of Judicial Conduct, COLO. REV. STAT., Vol. 7A (Court Rules), Appendix to Chapter 24.

(7) *Connecticut* – Canon 3(A)(7) of the Connecticut Code of Judicial Conduct is similar to ABA Canon 3(A)(7). The media have requested that coverage be permitted and have provided the Judicial Assembly (all State judges) with demonstrations of coverage, including tapes of mock trials. The Connecticut Bar Association Task Force, including attorneys and judges, are expected to submit recommendations on coverage to the Connecticut Supreme Court around July of 1980. *Authority:* Canon 3(A)(7), Connecticut Code of Judicial Conduct, Connecticut Practice Book (1978 Revision), Vol. 1.

(8) *Delaware* – Canon 3(A)(7) of the Delaware Judges' Code of Judicial Conduct is similar to the current ABA Canon. Rule 169 of the Rules of the Delaware Court of Chancery applies this code to its proceedings. Rule 53 of the Delaware Superior Court Criminal Rules, Rule 53 of

the Delaware Court of Common Pleas Criminal Rules, and Rule 31 of the Criminal Rules of Delaware Courts of Justices of the Peace forbid coverage. The Delaware Bar/Bench/Press Committee, appointed by the Delaware Supreme Court on September 30, 1975, is scheduled to issue a report on coverage shortly. *Authority:* Canon 3(A)(7), Delaware Judges' Code of Judicial Conduct, adopted by Rule 74, Rules of the Delaware Supreme Court, DEL. CODE, Vol. 16; Rule 53, Delaware Court of Common Pleas Civil Rules, DEL. CODE, Vol. 16; Rule 53, Delaware Superior Court Criminal Rules, DEL. CODE, Vol. 16; Rule 31, Delaware Courts of Justice of the Peace, Criminal Rules, DEL. CODE, Vol. 16. *See also* Rule 169, Rules of the Delaware Court of Chancery, DEL. CODE, Vol. 16.

(9) *District of Columbia* — Canon 35 of the District of Columbia Canons of Judicial Ethics parallels the provisions of former Canon 35 of the ABA Canons of Judicial Ethics. In the District of Columbia, Rule 53(b) of the Superior Court Rules of Criminal Procedure, Rule 203(b) of the Superior Court Rules of Civil Procedure, Superior Court Neglect Proceedings Rule 24(b), Superior Court Juvenile Proceedings Rule 53(b), and Superior Court Domestic Relations Rule 203(b) forbid coverage in trial proceedings. *Authority:* All provisions cited in the foregoing paragraph are contained in D.C. Code Encycl. (Court Rules - D.C. Courts) (West).

(10) *Florida* — A coverage experiment was initiated by the Florida Supreme Court in *Petition of Post-Newsweek Stations, Florida, Inc.* on January 27, 1976. 327 So. 2d 1. Initially, the experiment was not statewide and required that parties, jurors, and witnesses consent to coverage of their participation. This requirement was deleted, however, when the Florida courts met with total failure in ob-

taining the needed consents. On April 7, 1977, the Supreme Court ordered a one-year experiment from July 1, 1977 until June 30, 1978 (347 So. 2d 402) and adopted standards of conduct and technology (347 So. 2d 404). Prior approval by the Supreme Court of proposed standards and technology governing coverage was required. On April 12, 1979 in *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, the Florida Supreme Court amended Canon 3A(7) of the Florida Code of Judicial Conduct to permit coverage of trial and appellate courts effective May 1, 1979 and repealed Florida Rule of Criminal Procedure 3.110. Coverage is subject only to the authority of the presiding judge to control court proceedings, prevent distractions, maintain decorum, and assure fairness of the trial. *Authority:* Canon 3A(7), Florida Code of Judicial Conduct, Florida Rules of Court (West 1980). *See also* Article X, Integration Rule of the Florida Bar, Florida Rules of Court (West 1980) (applicability of code to members of the Florida Bar).

(11) *Georgia* – On May 12, 1977, the Supreme Court of Georgia amended the Georgia Code of Judicial Conduct by adding Canon 3A(8). 238 Ga. 855. (The Code had previously been adopted on December 17, 1973, effective January 1, 1974. 231 Ga. A-1.) Under Canon 3A(8), coverage of Georgia courts is permitted if a plan is approved in advance by the Supreme Court and if the affected court permits coverage. The Supreme Court is explicitly empowered to make rules to assure that the dignity and decorum of the proceedings remain unimpaired. Plans approved by the Supreme Court, including the plan for coverage of its own proceedings, have required consent of the attorneys and the parties and – in the trial context – of witnesses. *Authority:* Canon 3A(7) and 3A(8), Georgia Code of Judicial Conduct, referenced in GA. CODE ANN. § 24-4542 (Rule 42, Rules of the Georgia Supreme Court).

(12) *Hawaii* – Canon 3A(7) of the Hawaii Code of Judicial Conduct follows the current ABA Canon. *Authority:* Canon 3A(7), Hawaii Code of Judicial Conduct, adopted by Rule 16, Rules of the Supreme Court of the State of Hawaii (Appendix B) (Supreme Court of Hawaii).

(13) *Idaho* – By order dated September 27, 1976, the Idaho Supreme Court adopted a Code of Judicial Conduct to replace the Canons of Judicial Ethics which were previously in effect. Canon 3A(7) of the Idaho Code of Judicial Conduct specifies that judges shall comply with any coverage rule promulgated by the Idaho Supreme Court. By order dated October 18, 1978, the Idaho Supreme Court approved a plan for experimental coverage of its Boise proceedings for the period December 4, 1978 through June 30, 1979. Coverage was subject to the Court's discretion. By order dated August 27, 1979, the Idaho Supreme Court authorized coverage of its Boise proceedings for an indefinite period. The Idaho Supreme Court retains discretion to forbid coverage when it would interfere with "the proper administration of justice." On August 27, 1979, the Idaho Supreme Court also authorized one year (October 9, 1979 through October 8, 1980) of experimental coverage – subject to the Court's discretion – of its proceedings outside the Boise area. *Authority:* Canon 3A(7), Idaho Code of Judicial Conduct, Idaho State Bar Desk Book.

(14) *Illinois* – Rule 61(c)(24) of the Rules of the Illinois Supreme Court parallels the provisions of former ABA Canon 35 as originally adopted in 1937. Illinois Revised Statutes, Chapter 51, § 57 specifies that no witness shall be compelled to testify in any court in the State if any portion of his testimony is to be covered. A petition of the Illinois News Broadcasters Association to amend Illinois Supreme

Court Rule 61(c)(24) was denied by the Illinois Supreme Court on May 26, 1978. *Authority:* Rule 61(c)(24), Rules of the Illinois Supreme Court, ILL. REV. STAT. Ch. 110A; ILL. REV. STAT. Ch. 51, § 57.

(15) *Indiana* – Canon 3A(7) of the Indiana Code of Judicial Conduct is based on the current ABA provision. Coverage of a number of trial proceedings has occurred in Indiana but ceased after the Chief Justice of the Indiana Supreme Court notified State judges of the requirements of Canon 3A(7). *Authority:* Canon 3A(7), Indiana Code of Judicial Conduct, IND. CODE ANN. (Court Rules, Book 2) (Burns).

(16) *Iowa* – Canon 3A(7) of the Iowa Code of Judicial Conduct is similar to the present ABA Canon. On June 25, 1979, the Iowa Supreme Court ordered a public hearing on the coverage question. Following a hearing on September 18, 1979, that Court, by order dated November 21, 1979, suspended Canon 3A(7) for a one-year period beginning January 1, 1980 and substituted a revised provision which enumerates technical guidelines and which permits coverage of trial and appellate courts subject to the affected court's prior permission. In determining whether to grant permission, judges are to allow coverage unless, upon objection and showing of good cause, it would "materially interfere" with a fair trial. Consents of the parties are not required except in "juvenile, dissolution, adoption, child custody or trade secrets cases". *Authority:* Canon 3A(7), Iowa Code of Judicial Conduct, adopted by Rule 119, Rules of the Iowa Supreme Court, IOWA CODE (Court Rules), Vol. III.

(17) *Kansas* – Canon 3A(7) of the Kansas Code of Judicial Conduct is premised on the current ABA provision. *Authority:* Canon 3A(7), Kansas Code of Judicial

Conduct, adopted by Rule 601, Rules of the Kansas Supreme Court, KAN. STAT. § 20-176.

(18) *Kentucky* – Canon 3A(7) of the Kentucky Code of Judicial Conduct parallels the present ABA provision. The Kentucky Code of Judicial Conduct was adopted in its entirety on October 24, 1977 to be effective January 1, 1978, and rendered inoperative an August 23, 1977 resolution of the Jefferson Circuit Court (30th Judicial Circuit). Under this resolution, the signatory judges agreed to permit coverage of their trial proceedings unless it became disruptive or except in certain sensitive trial situations involving children and matters of domestic relations. *Authority:* Canon 3A(7), Kentucky Code of Judicial Conduct, adopted by Rule 4.300, Rules of the Kentucky Supreme Court, KY. REV. STAT. (Rules), Vol. 18.

(19) *Louisiana* – Canon 3A(7) of the Louisiana Code of Judicial Conduct follows the current ABA provision. On February 23, 1978, the Louisiana Supreme Court Conference authorized one year of experimental coverage in a trial court – Division B of the Ninth Judicial District Court for Rapides Parish. Under the guidelines, written permission of the parties and their counsel was required and, in criminal cases, this included the consents of the victim and the District Attorney. A report, dated March 30, 1979, by the trial judge recommended extension of the experiment and, on May 3, 1979, the Supreme Court of Louisiana extended the experiment for one year from the date of its order. Shortly thereafter, on July 13, 1979, Section 4164 of Title 13 of the Louisiana Revised Statutes became law. It permits coverage of court proceedings pursuant to any motion and stipulation, agreed to by all parties and approved by the judge. In *Fitzmorris v. Lambert,* 377 So. 2d 65 (1979), the Louisiana Supreme Court held that this statute and Canon 3A(7) did not necessarily con-

flict as long as a trial judge, in exercising his authority under the statute, complies with the requirements of the Canon. On May 9, 1980, Judge Douglas M. Gonzales, Division L of the Nineteenth Judicial District for East Baton Rouge Parish requested the Louisiana Supreme Court to authorize a one-year experiment permitting coverage of civil trials in that division. The proposed experiment would use the same guidelines employed in the Ninth Judicial District and was the result of several years of study conducted by a Bench-Bar-Media Committee for the Nineteenth District. *Authority:* Canon 3A(7), Louisiana Code of Judicial Conduct, LA. REV. STAT. ANN., Vol. 8 (Appendix) (West); LA. REV. STAT. ANN. § 13-4164 (West).

(20) *Maine* – Rule 53 of the Maine Rules of Criminal Procedure bars coverage in criminal cases. Likewise, Rule 53 of the Maine District Court Criminal Rules forbids coverage in district court criminal cases. The Maine Code of Judicial Conduct deletes Canon 3A(7). Maine Rules of Court, Desk Copy (West 1979). Accordingly, Maine has no provision barring coverage of civil cases. At present, an advisory committee appointed by the Maine Supreme Court is studying the coverage issue. *Authority:* Rule 53, Maine Rules of Criminal Procedures, Maine Rules of Court, Desk Copy (West 1979); Rule 53, Maine District Court Criminal Rules, Maine Rules of Court, Desk Copy (West 1979).

(21) *Maryland* – Canon XXXIV of the Maryland Canons of Judicial Ethics is based on ABA Canon 35 following the 1963 amendments. Rule 11 of the Maryland Rules of Judicial Ethics also forbids coverage. Currently, a petition to modify Canon XXXIV is pending before the Maryland Court of Appeals. *Petition of WBAL Division* (Sept. 25, 1979). Experimental coverage has been recom-

mended by a Judges' Committee and by the Special Committee on Cameras in the Courtroom of the Maryland State Bar Association. Under the proposal, coverage of civil and criminal trial proceedings in Maryland would be permitted for an 18-month experimental period where the parties consent to coverage. Appellate court coverage would be allowed on a non-experimental basis. On June 24, 1980, the Maryland Court of Appeals heard oral argument on the proposal. *Authority:* Canon XXXIV, Maryland Canons of Judicial Ethics, adopted by Rule 1231, MD. ANN. CODE (Maryland Rules of Procedure), Vol. 9C.

(22) *Massachusetts* – Canon 3A(7) of the Massachusetts Code of Judicial Conduct is similar – but not identical – to the current ABA provision. On March 21, 1980, the Supreme Judicial Court suspended this canon effective April 1, 1980 for an experimental one-year period. Appellate court coverage of civil and criminal cases began April 1, 1980; coverage of public, non-jury trials (civil and criminal) commenced May 1, 1980; and coverage of public jury trials (civil and criminal) was permitted as of June 1, 1980. As a general rule, coverage is to be allowed unless the court finds that there is "a substantial likelihood of harm to any person or other serious harmful consequence" resulting from such coverage. *Authority:* Canon 3A(7), Massachusetts Code of Judicial Conduct, adopted by Rule 3:25, Rules of the Massachusetts Supreme Judicial Court, Massachusetts Rules of Court, Desk Copy (West 1980) (as modified by above-referenced order).

(23) *Michigan* – Canon 3A(7) of the Michigan Code of Judicial Conduct forbids coverage except as authorized by the Michigan Supreme Court. To date, no coverage authorization has been given. *Authority:* Canon 3A(7),

Michigan Code of Judicial Conduct, Michigan Court Rules (West 1979).

(24) *Minnesota* – Canon 3A(7) of the Minnesota Code of Judicial Conduct parallels the current ABA provision. By order dated January 27, 1978, the Minnesota Supreme Court permits Canon 3A(7) to be waived for experimental purposes in cases pending before that tribunal. The experiment is for an indefinite period, and waiver of the rules is at the discretion of the Court. *Authority:* Canon 3A(7), Minnesota Code of Judicial Conduct, MINN. STAT. ANN. (Court Rules), Vol. 52 (West) (as modified by above-referenced order).

(25) *Mississippi* – Canon 3A(7) of the Code of Judicial Conduct of Mississippi Judges is the operative provision and parallels the current ABA Canon. The coverage issue is currently being studied by a committee of the Mississippi Conference of Judges. *Authority:* Canon 3A(7), Code of Judicial Conduct of Mississippi Judges, contained in Code of Professional Responsibility, Code of Judicial Conduct, Ethics Opinions (Mississippi State Bar).

(26) *Missouri* – Canon 3A(7) of the Missouri Code of Judicial Conduct is based on the current ABA provision. On November 19, 1979, the Board of Governors of the Missouri Bar submitted a proposal to the Missouri Supreme Court recommending that coverage of appellate proceedings be permitted with the consent of the parties. That proposal is currently pending before the Missouri Supreme Court. *Authority:* Canon 3A(7), Missouri Code of Judicial Conduct, adopted by Rule 2, Rules of the Missouri Supreme Court, MO. ANN. STAT. (Rules, Vol. 1) (Vernon).

(27) *Montana* – On February 3, 1978, the Montana Supreme Court suspended Canon 35 of the Montana

Canons of Judicial Ethics, which was premised on ABA Canon 35 following its amendment in 1952, to allow for a two-year experiment commencing April 1, 1978. *In the Matter of Canon 35 of the Montana Canons of Judicial Ethics.* Experimental Canon 35 required trial and appellate courts in Montana to permit coverage unless coverage in a particular case was deemed to "substantially and materially interfere with the primary function of the court to resolve disputes fairly." In such cases, the court was required to record its reasons for forbidding coverage. On April 18, 1980, the Montana Supreme Court amended Canon 35 of the Montana Canons of Judicial Ethics, effective immediately, to allow coverage of trial and appellate courts in that State. The terms of the amended canon are identical to those of the experimental canon. *Authority:* Canon 35, Montana Canons of Judicial Ethics, 144 Mont. xxii (1964), amended by order of April 18, 1980 (5 MONTANA LAWYER 12-13).

(28) *Nebraska* – Canon 3A(7) of the Nebraska Code of Judicial Conduct, adopted on April 18, 1973, is the same as ABA Canon 3A(7). *Authority:* Canon 3A(7), Nebraska Code of Judicial Conduct (no official citation or publication).

(29) *Nevada* – Canon 3A(7) of the Nevada Code of Judicial Conduct specifies that a court shall – on its own motion, the motion of any attorney, or the request of a witness testifying under subpoena – prohibit coverage by minute order. Chapters 1.220 and 178.604 of the Laws of Nevada, captioned "Court may prohibit broadcasting, televising, motion pictures of proceedings," reflected the same rule but were repealed by Assembly Bill No. 571 on March 21, 1979. By order dated February 6, 1980, the Nevada Supreme Court suspended Canon 3A(7) of the Nevada Code of Judicial Conduct to permit one year of experimental coverage of trial and appellate courts effec-

tive April 7, 1980. *In the Matter of Rules Setting Forth the Standards of Conduct and Technology Governing Electronic Media and Still Photo Coverage of Judicial Proceedings,* ADKT 26. The experimental rule does not require consent of the participants but subjects coverage to the judge's authority to ensure decorum, prevent distractions, and assure a fair trial. Prior to the effective date of the experimental rule, however, both trial and appellate coverage had been permitted on a sporadic basis. *Authority:* Canon 3A(7), Nevada Code of Judicial Conduct, adopted as Part IV of the Rules of the Nevada Supreme Court, NEV. REV. STAT., Vol. 1 (as modified by above-referenced order).

(30) *New Hampshire* – Rule 29 of the Rules of the Supreme Court of New Hampshire, issued December 6, 1977, and effective January 1, 1978, permits coverage of that Court's proceedings subject to the Court's consent. Canon 3A(7) of New Hampshire Supreme Court Rule 25 was, by order dated October 12, 1977, amended to permit the New Hampshire Superior Court to issue rules governing coverage effective January 1, 1978. Rule 78(A) of the Rules of the New Hampshire Superior Court, also effective January 1, 1978, forbids coverage except as provided in those rules or by order of the Presiding Justice. Interim guidelines for that rule permit coverage and state that the Presiding Justice may forbid coverage on his motion or on the motion of an attorney, party, or any witness called to testify. They also require prior express approval of the Presiding Justice in order to cover the jury in criminal cases. *Authority:* Rules 25 and 29, Rules of the New Hampshire Supreme Court, State of New Hampshire Court Rules and Directory (Equity); Rule 78(A), Rules of the New Hampshire Superior Court, State of New Hampshire Court Rules and Directory (Equity). These rules were formerly published as Appendices to N.H. REV. STAT. ANN. Chs. 490, 491.

(31) *New Jersey* – Rule 1:14 of the Rules of General Application to the Courts of New Jersey states that the ABA Code of Judicial Conduct, as amended and supplemented by the New Jersey Supreme Court, governs the conduct of New Jersey judges. By order dated November 21, 1978, the New Jersey Supreme Court ordered relaxation of Canon 3A(7) of the New Jersey Code of Judicial Conduct for the purpose of allowing coverage of its proceedings on December 12, 1978. On March 15, 1979, that Court ordered further relaxation of the Code of Judicial Conduct to permit coverage for an experimental period lasting one year or until six trials had been covered. The experiment commenced May 1, 1979. Under the experiment, coverage of New Jersey's appellate courts was permitted, and coverage of trial courts was allowed in Atlantic and Bergen Counties. Consents of participants were not required, but coverage of trials was banned in juvenile court cases or cases involving rape, child custody, divorce or matrimonial disputes, and trade secrets. Trial courts were also explicitly empowered to prohibit coverage where coverage would substantially increase the threat of harm to any participant or interfere with a fair trial or the fair administration of justice. On April 30, 1980, the New Jersey Supreme Court extended the experiment for an additional six months (until November 1, 1980) and expanded the experiment to permit trial coverage in all counties of the State. With these exceptions, the original experimental guidelines remain the same. *Authority:* Canon 3A(7), New Jersey Code of Judicial Conduct, Rules of General Application to the Courts of New Jersey, Part I (Appendix), New Jersey Court Rules (Pressler) (as modified by above-referenced orders); Rule 1:14, Rules of General Application to the Courts of New Jersey, New Jersey Court Rules (Pressler).

(32) *New Mexico* — The New Mexico Supreme Court, by order dated August 14, 1978, permitted coverage of a criminal trial proceeding. *In the Matter of Photographs, Radio and Television Coverage in State of New Mexico v. Richard Miller, Cause No. 30581-Criminal, Bernalillo County, New Mexico,* 8000 Misc. By order dated April 28, 1980, the New Supreme Court withdrew Canon 3A(7) of the New Mexico Code of Judicial Conduct, which parallels the current ABA provision, and substituted a provision authorizing coverage of district (trial) courts and appellate courts in New Mexico for an experimental period of one year beginning July 1, 1980. Under the experiment, appellate court coverage is not contingent upon the consent of the parties or their counsel although the court may impose limitations on coverage. In the trial courts, coverage may be authorized by the court acting within its discretion except that judges shall not permit coverage of any witness or juror who objects and who is in attendance under subpoena or court order. Coverage is prohibited in criminal cases unless the defendant gives consent. Photographic coverage of individual jurors is banned except in cases where the court and the jurors consent. For victims of sex crimes and their families, police informants, undercover agents, relocated witnesses, and juveniles, photographic coverage is absolutely forbidden. Under the experiment, coverage of courts other than appellate and district courts (*e.g.*, magistrate courts) is forbidden. Rule 4 of the Rules of the New Mexico Supreme Court, Rule 90 of the Rules of Civil Procedure for New Mexico District Courts, Rule 31 of the Rules of Criminal Procedure for New Mexico Magistrate Courts, and Rule 49 of the Rules of Criminal Procedure for New Mexico District Courts either explicitly permit coverage or allow coverage upon express approval of the Supreme Court. Rule 28 of the Rules of Civil Procedure for New Mexico Magistrate

Courts continues an express prohibition on coverage. *Authority:* Canon 3A(7), New Mexico Code of Judicial Conduct, N.M. STAT. ANN., Vol. 2 (Judicial Volume). Other rule citations furnished above are contained in N.M. STAT. ANN., Vol. 1 (Judicial Volume).

(33) *New York* – Canon 3A(7) of the New York Code of Judicial Conduct is similar to the current ABA provision. The Code of Judicial Conduct specifies, however, that its rules are subordinate to those of the Administrative Board of the Judicial Conference. The Administrative Board's rule, 22 NYCRR § 33.3(a)(7), specifies that coverage is prohibited unless permission is first obtained from the Chief Judge of the Court of Appeals or the Presiding Justice of the Appellate Division in which the court is located. By order dated August 16, 1979, the New York Court of Appeals authorized coverage of its proceedings on a one-day experimental basis. This coverage occurred on October 16, 1979. A Media Advisory Committee, appointed by the Chief Judge of the New York Court of Appeals on December 6, 1979, submitted its report to the Court on May 30, 1980. After studying the one-day experiment in the Court of Appeals and the experience in other States, the Committee recommended that coverage of appellate proceedings be permitted on a permanent basis. Such coverage would not be conditioned on the consent of the participants although the court could impose limitations on a finding of good cause. The Committee also recommended experimental trial court coverage for one year or at least twenty trials. In view of the decision of the Supreme Court of the United States to review *Chandler v. Florida,* the Committee requested that the experiment be limited to civil proceedings. Under its recommendation, consent of participants would not be a

precondition to coverage. A similar recommendation, suggesting permanent rules on appellate court coverage and an experiment with civil and criminal trial court coverage in which consents would not be an absolute pre-condition, was made on April 7, 1980 by the Special Committee on Communications Law of the Association of the Bar of the City of New York. *Authority:* Canon 3A(7), New York Code of Judicial Conduct, N.Y. [Judiciary] LAW, Book 29 (Appendix) (McKinney); 22 NYCRR § 33.3(a)(7), reported in New York Civil Practice Annual (Court Rules) (Bender 1978-79) (as modified by above-referenced order).

(34) *North Carolina* – Canon 3A(7) of the North Carolina Code of Judicial Conduct parallels the present ABA provision. Rule 15 of the General Rules of Practice for the Superior and District Courts of North Carolina bans coverage except on ceremonial occasions. *Authority:* Canon 3A(7), North Carolina Code of Judicial Conduct, N.C. GEN. STAT., Vol. 4A (Appendix VII - A); Rule 15, General Rules of Practice for the Superior and District Courts of North Carolina, N.C. GEN. STAT., Vol. 4A (Appendix I).

(35) *North Dakota* – On December 1, 1978, the North Dakota Supreme Court amended Canon 3A(7) of the North Dakota Code of Judicial Conduct, which previously paralleled the current ABA provision, to permit coverage of its proceedings subject to guidelines. In that order, the Supreme Court announced that experimental coverage of its proceedings would be permitted for a one-year period beginning February 1, 1979. The Court retained the right to prohibit coverage of certain proceedings, but coverage was not conditioned on consents of the parties or their counsel. *Petition For An Administrative Order Providing An Exception To Canon 3A(7) Of The Code Of Judicial Conduct Allowing A Period Of Ex-*

*perimental Electronic Media And Photographic Coverage Of Certain Cases And Proceedings Before The North Dakota Supreme Court,* AO 1-1978. *See* note to N.D. CENT. CODE § 27-01-02. By order dated January 24, 1980, the North Dakota Supreme Court extended the experiment for a period of five months (until July 1, 1980) and announced that, on May 6, 1980, it would hold a hearing to evaluate the experiment. *Electronic And Photographic Coverage Of Supreme Court Cases Extended To July 1, 1980,* AO 1-1980. On May 16, 1980, the North Dakota Supreme Court amended Canon 3A(7) of the North Dakota Code of Judicial Conduct to permit coverage of its proceedings on a permanent basis effective July 1, 1980. This coverage is subject to the same rules used during the experiment. *Electronic And Photographic Coverage Of Supreme Court Hearings,* AO 1A-1980. Rule 53 of the North Dakota Rules of Criminal Procedure prohibits coverage of criminal trial proceedings. *Authority:* Canon 3A(7), North Dakota Code of Judicial Conduct, Manual of North Dakota Supreme Court (North Dakota Supreme Court); Rule 53, North Dakota Rules of Criminal Procedures, N.D. CENT. CODE, Vol. 5B (Rules of Procedure).

(36) *Ohio* – On July 31, 1978, the Ohio Supreme Court published proposed draft amendments to Canon 3A(7) of the Ohio Code of Judicial Conduct, Superintendence Rule 11 of the Ohio Supreme Court, and Rule 9 of the Rules of Superintendence for Municipal Courts. These provisions had previously precluded coverage of Ohio courts, and the proposed amendments would have eliminated that ban. Following the period allowed for comments on the proposals, the Supreme Court adopted experimental provisions to be effective for a one-year period beginning June 1, 1979. Under these provisions, coverage of trial and appellate courts in Ohio is permitted subject to the court's

power to preclude coverage when it would be distractive, impair the dignity of the proceedings, or interfere with a fair trial. Coverage is not contingent on consent of participants, although the court may ban coverage of objecting witnesses or victims provided it determines there is reasonable cause for the objection. By order dated May 22, 1980, the Ohio Supreme Court extended the experiment until further order to permit continued coverage pending the Court's study of the experiment. *Authority:* Canon 3A(7) and the rules cited in this paragraph are contained in OHIO REV. CODE ANN. (Rules Governing the Courts of Ohio) (Page 1979).

(37) *Oklahoma* – By order dated October 25, 1978, the Oklahoma Supreme Court withdrew Canon 3A(7) of the Oklahoma Code of Judicial Conduct – which paralleled the current ABA provision – and substituted a revised Canon 3A(7) to be effective for one year beginning January 1, 1979. Under the experimental provision, trial and appellate coverage is permitted subject to consent of the court. Coverage of objecting witnesses, jurors, or parties is not permitted and, in a criminal trial, the defendant must consent to coverage. By order dated December 27, 1979, the Oklahoma Supreme Court extended the experiment for another year commencing January 1, 1980. *Authority:* Canon 3A(7), Oklahoma Code of Judicial Conduct, Oklahoma Court Rules and Procedures, Desk Copy (West 1979-80) (as modified by order of December 27, 1979).

(38) *Oregon* – Canon 3A(7) of the Oregon Code of Judicial Conduct parallels the present ABA provision. Experimental coverage was proposed by the Public Information Committee of the Oregon Judicial Conference on April 1, 1980, but the Oregon Judicial Conference tabled the proposal on April 29, 1980. This action followed dis-

cussions in which notation of probable jurisdiction by the Supreme Court of the United States in *Chandler v. Florida* was cited as a reason for delaying immediate action. The Oregon Supreme Court, however, has since decided against dropping the coverage issue completely. *Authority:* Canon 3A(7), Oregon Code of Judicial Conduct, Oregon State Bar Desk Book (Oregon State Bar).

(39) *Pennsylvania* — By order dated September 20, 1979, the Pennsylvania Supreme Court amended Canon 3A(7) of the Pennsylvania Code of Judicial Conduct to permit experimental coverage of non-jury civil trial proceedings for a one-year period beginning October 1, 1979. *In Re WTAE-TV,* No. 51 (W. D. Misc. Docket 1978). Previously, the Pennsylvania canon paralleled the current ABA provision. Coverage is also forbidden by Rules 27 and 328 of the Pennsylvania Rules of Criminal Procedure and Rule 7 of the Rules Governing Standards of Conduct of Justices of the Peace. Under the experiment, non-jury civil trial proceedings do not include support, child custody, or divorce proceedings. Permission of the court must be received prior to coverage, and coverage of objecting witnesses or parties is not permitted. In May, 1980, a supplementary petition was filed in the *WTAE-TV* proceeding. In the supplementary petition, the Pennsylvania Supreme Court is requested to expand the experiment to allow coverage of criminal trial proceedings and civil jury proceedings. Alternatively, the supplementary petition suggests that the existing experiment be extended six months. By order dated June 26, 1980, the Pennsylvania Supreme Court deferred action on the supplementary petition until its September, 1980 session. *Authority:* The provisions cited in this paragraph are contained in Pennsylvania Rules of Court, Desk Copy (West 1980).

(40) *Rhode Island* – Canon 30 of Rhode Island's Canons of Judicial Ethics prohibits broadcasting or televising of court proceedings as well as the taking of photographs or sketching in the courtroom. Rule 53 of the Rules of Criminal Procedure of the Rhode Island Superior Court contains a similar prohibition. Rule 53 of the Rules of Criminal Procedure of Rhode Island's District Court is identical except that no prohibition on sketching is included. A special committee has been appointed by the Rhode Island Supreme Court to study the coverage question. *Authority:* Canon 30, Rhode Island Canons of Judicial Ethics, adopted by Rule 48, Rules of the Rhode Island Supreme Court, R.I. GEN. LAWS, Vol. 2B (Court Rules); Rule 53, Rhode Island Superior Court Rules of Criminal Procedure, R.I. GEN. LAWS, Vol. 2B (Court Rules); Rule 53 Rhode Island District Court Rules of Criminal Procedure, R.I. GEN. LAWS, Vol. 2B (Court Rules).

(41) *South Carolina* – Canon 3A(7) of the South Carolina Judicial Conduct is similar to the present ABA provision. Coverage has been permitted by at least one trial judge, Wade S. Weatherford, Jr. of the Seventh Circuit, in a non-jury matter. Judge Weatherford was later informed of the requirements of Canon 3A(7), and coverage ceased as a result. *Authority:* Canon 3A(7), South Carolina Code of Judicial Conduct, adopted by Rule 33, Rules of the South Carolina Supreme Court, S.C. CODE, Vol. 22 (Court Rules).

(42) *South Dakota* – Canon 3A(7) of the South Dakota Code of Judicial Conduct is similar to the present ABA provision. The South Dakota Broadcasters Association has made coverage presentations to the South Dakota Supreme Court and its Advisory Committee. *Authority:*

Canon 3A(7), South Dakota Code of Judicial Conduct, S.D. COMPILED LAWS ANN. § 16-2 (Appendix).

(43) *Tennessee* – By order dated May 24, 1978, the Tennessee Supreme Court amended Canon 3A(7), contained in Rule 43 of its rules, to adopt an interim provision allowing coverage of its proceedings subject to the objection of participating counsel. *In re Rule 43, Canon 3A(7) – Code of Judicial Conduct.* On February 22, 1979, the Tennessee Supreme Court ordered the amendment of Canon 3A(7) to permit coverage of trial and appellate proceedings in Tennessee. Under the amendment, appellate courts may adopt rules permitting coverage subject to certain guidelines, including the injuction that coverage shall not detract from court proceedings. Trial courts are also authorized to permit coverage in accordance with plans which must be approved by the Tennessee Supreme Court. In criminal trial proceedings, the defendant must consent to coverage. In all trial proceedings, objections by a witness or juror will suspend coverage as to that person while objections by an attorney or party will suspend all coverage. By its terms, the Tennessee Supreme Court's order had no applicability to criminal proceedings until such time as the Tennessee legislature approved amendments to the Tennessee Rules of Criminal Procedures. *In re Rule 43, Canon 3A(7) – Code of Judicial Conduct.* Effective August 15, 1979, Rule 53 of those rules – which prohibited coverage of criminal proceedings – was withdrawn. *Authority:* Canon 3A(7), Tennessee Code of Judicial Conduct, adopted by Rule 43, Rules of the Tennessee Supreme Court, TENN. CODE ANN., Vol. 5A (Court Rules).

(44) *Texas* – By order dated November 9, 1976, the Texas Supreme Court amended Canon 3A(7) of the Texas

Code of Judicial Conduct to permit coverage of appellate proceedings. The prior consent of the court (or the Chief Justice or Presiding Judge) must be obtained, and the coverage must not distract participants or impair the dignity of proceedings. *Authority:* Canon 3A(7), Texas Code of Judicial Conduct, TEX. REV. CIV. STAT., Vol. 1A, Title 14 (Appendix B) (Vernon).

(45) *Utah* – Canon 3A(7) of the Utah Code of Judicial Conduct is similar to the present ABA provision. A petition requesting experimental coverage is pending before the Utah Supreme Court and was argued in November, 1979. *In re Petition of Society of Professional Journalists,* Case No. 16140. *Authority:* Canon 3A(7), Utah Code of Judicial Conduct, Utah State Bar Desk Book (Utah State Bar).

(46) *Vermont* – Canon 3A(7) of the Vermont Code of Judicial Conduct parallels the current ABA provision. Rule 53 of the Vermont Rules of Criminal Procedure prohibits coverage in criminals cases except as allowed by order of the Vermont Supreme Court. At present, a committee of the Vermont Bar Association is expected to present its recommendations concerning experimental coverage to the Vermont Supreme Court in September, 1980. *Authority:* Canon 3A(7), Vermont Code of Judicial Conduct, VT. STAT. ANN., Title 12, Appendix VIII, Administrative Order No. 10.

(47) *Virginia* – Canon 3A(7) of the Virginia Canons of Judicial Conduct is similar, but not identical, to the present ABA provision. *See* 215 Va. 859, 931 (1975); 216 Va. 914, 1134 (1976). Coverage of criminal proceedings is also forbidden under Section 19.2-266 of the Virginia Code and Supreme Court Rule 3A:34 (VA. CODE, Vol. 2 - Rules of Court). Supreme Court Rule 1:14 (VA. CODE, Vol. 2 -

Rules of Court) precludes coverage of all judicial proceedings. *Authority:* Canon 3A(7), Virginia Canons of Judicial Conduct, Virginia Supreme Court Rules (Part VI, Section III - Integration of the State Bar), VA. CODE, Vol. 2 - Rules of Court. *See also* citations provided in paragraph above.

(48) *Washington* – Acting upon a recommendation of the Bench-Bar-Press Committee of Washington, the Supreme Court of Washington, on November 28, 1973, authorized experimental courtroom coverage. This coverage first occurred in a criminal trial proceeding on December 2, 1974. *State v. Fetter,* Case No. 69484 (King County). Following its review of the results of that experiment, the Washington Supreme Court, by order dated July 23, 1976, amended Canon 3(A)(7) of the Washington Code of Judicial Conduct effective September 20, 1976. *In the Matter of the Adoption of Amendments to Code of Judicial Conduct, Canon 3(A)(7).* Under that amendment, coverage of trial and appellate proceedings in Washington is permitted if the court grants permission and if coverage will not distract participants or impair the dignity of the proceedings. No coverage of witnesses, jurors, or parties who express prior objections is permitted. *Authority:* Canon 3(A)(7), Washington Code of Judicial Conduct, Washington Court Rules Annotated, Vol. 1, Part 1 (Bancroft-Whitney).

(49) *West Virginia* - Canon 3A(7) of the West Virginia Judicial Code of Ethics parallels the current ABA provision. By letter dated November 14, 1978, the Chief Justice of the West Virginia Supreme Court of Appeals authorized the Seventeenth Judicial Circuit (Monongalia County) to permit coverage of its trial proceedings subject to certain guidelines. Under those guidelines, the trial court was empowered both to decide whether coverage should be

permitted in particular cases and to terminate existing coverage when it would impede justice. Although parties, witnesses, or attorneys could object to coverage, the court was given the authority to rule on such objections. To obtain further experience under the experiment, the Chief Judge of the Seventeenth Judicial Circuit extended the experiment, which eventually began in January 1979, through the end of 1979. (The Chief Judge had originally recommended only a six-month experimental period.) The Chief Judge has also informed the Supreme Court of Appeals that, unless it objects, he will continue the experiment into 1980. *Authority:* Canon 3A(7), West Virginia Judicial Code of Ethics, W. VA. CODE, Vol. 1 (Constitutions), Appendix.

(50) *Wisconsin* – On December 23, 1977, the Wisconsin Supreme Court, suspended Rule 14 of the Wisconsin Code of Judicial Ethics to permit coverage of trial and appellate proceedings for a one-year experimental period beginning April 1, 1978. The Court also specified that it would permit coverage of its proceedings on January 3, 1978 and of its February 20, 1978 hearing to determine guidelines for the experiment. By order dated March 16, 1978, the Wisconsin Supreme Court promulgated these experimental guidelines. Under those guidelines, the courts were authorized to determine whether coverage should be permitted in particular cases or portions of particular cases. Upon a showing of cause, the courts could prohibit coverage on their own motions or on those of participants. The experiment was eventually extended through June 30, 1979, by order of the Wisconsin Supreme Court. Following a review of the April 1, 1979 "Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom," the Wisconsin Supreme Court, on June 21, 1979, rescinded

Rule 14 of the Wisconsin Code of Judicial Ethics and permanently authorized trial and appellate coverage effective July 1, 1979. Under the permanent rule, courts retain authority to determine whether coverage should occur and, upon a finding of cause, to prohibit coverage. A presumption of validity attends objections to coverage of participants in cases involving the victims of crimes (including sex crimes), police informants, undercover agents, juveniles, relocated witnesses, divorce, trade secrets, and motions to supress evidence. The Wisconsin Code of Judicial Ethics (Wisconsin Supreme Court Rules, Chapter 60) no longer refers to the coverage issue. Instead, Chapter 61 of the Wisconsin Supreme Court Rules contains the rules governing coverage. *Authority:* Chapter 61, Wisconsin Supreme Court Rules, WIS. STAT. ANN. (Supreme Court Rules) (West 1980 Special Pamphlet).

(51) *Wyoming* — By order dated September 4, 1973, the Supreme Court of Wyoming adopted the ABA Code of Judicial Conduct in its entirety with one minor exception not relevant here. Rule 50 of the Wyoming Rules of Criminal Procedure prohibits coverage of criminal proceedings. Rule 12 of the Uniform Rules for the District Courts of Wyoming likewise bars coverage. *Authority:* All of the provision cited in this paragraph are contained in Wyoming Court Rules Annotated (Michie 1979 Rev. Ed.).

* * * *

**Canon 3A(7) of the ABA Code of Judicial Conduct** reads as follows:

> "A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

"*Commentary:* Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding."

The terms of the predecessor to Canon 3A(7), Canon 35, as originally enacted in 1937 and as amended in 1952 and 1963, are set out in the Appendix to Mr. Justice Harlan's concurring opinion in *Estes v. Texas*, 381 U.S. 532, 596-601 (1965).

# APPENDIX B

## Classification of State Rules on Coverage of Courts by Electronic and Photographic Media

In this Appendix, the *amici curiae* classify States which permit courtroom coverage according to a number of relevant categories. We have not included several States (such as Arkansas, Indiana, and South Carolina) in which sporadic coverage has occurred but not as the direct result of rules or decisions of these States' highest courts. More detailed information on the rules of each jurisdiction and citations to those rules are furnished in Appendix A.

## I. Classification According To Types Of Courts In Which Coverage Permitted

| Coverage Permitted | States | Total |
|---|---|---|
| A. Trial and Appellate Courts | Alabama, Alaska, California, Colorado, Florida, Georgia, Iowa, Louisiana, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Washington, Wisconsin | 19 |
| B. Trial Courts Only | Kentucky,[1] Pennsylvania, West Virginia[2] | 3 |
| C. Appellate Courts Only | Arizona, Idaho, Minnesota, New York,[3] North Dakota, Texas | 6 |

[1]Trial coverage was permitted on a non-experimental basis in the Jefferson Circuit Court (30th Judicial Court) until adoption of the Kentucky Code of Judicial Conduct.

[2]Trial coverage is restricted to the Seventeenth Judicial Circuit (Monogalia County).

[3]The New York Court of Appeals permitted coverage of its proceedings on a one-day experimental basis on October 16, 1979.

**II. Classification According To Whether Rule Permitting Coverage Is Permanent Or Experimental**

| Type Of Rule | States | Total |
|---|---|---|
| A. Permanent | Alabama, Alaska, Colorado, Florida, Georgia, Idaho,[4] Kentucky,[5] Louisiana,[6] Montana, New Hampshire, North Dakota, Tennessee, Texas, Washington, Wisconsin | 15 |
| B. Experimental | Arizona, California, Idaho,[7] Iowa, Louisiana,[8] Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York,[9] Ohio, Oklahoma, Pennsylvania, West Virginia | 15 |

*Note:* Since Idaho and Louisiana fall into both categories, the total number of States with permanent or experimental rules is really 28 rather than 30. Nine States (Alaska, Florida, Idaho, Louisiana, Montana, North Dakota, Tennessee, Washington, and Wisconsin) have implemented permanent rules during or after experimentation.

[4]The Idaho Supreme Court's order permitting coverage of its Boise proceedings seems to be permanent while its order allowing coverage of its proceedings outside Boise is experimental.

[5]*See* note 1, *supra.*

[6]The Louisiana Supreme Court has authorized experimental coverage and is considering additional authorization for experimentation. By statute, however, the Louisiana legislature has furnished directives under which coverage may occur.

[7]*See* note 4, *supra.*

[8]*See* note 6, *supra.*

[9]*See* note 3, *supra.*

### III. Classification According To Types Of Proceedings Which May Be Covered

| | Overall Rule | Type Of Proceeding Coverable | States | Total |
|---|---|---|---|---|
| A. | Trial Coverage Only | Civil and Criminal | Kentucky,[10] West Virginia | 2 |
| | | Criminal Only | None | 0 |
| | | Civil Only | Pennsylvania[11] | 1 |
| B. | Appellate Coverage Only | Civil and Criminal | Arizona, Idaho, Minnesota, New York,[12] North Dakota, Texas | 6 |
| | | Criminal Only | None | 0 |
| | | Civil Only | None | 0 |
| C. | Trial and Appellate Coverage | Civil and Criminal | Alabama, Alaska, California, Colorado, Florida, Georgia, Iowa, Louisiana, Massachusetts, Montana, | 19 |

| | | |
|---|---|---|
| | Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Washington, Wisconsin | |
| Criminal Only | None | 0 |
| Civil Only | None | 0 |



[10]*See* note 1, *supra.*

[11]Pennsylvania limits civil trial coverage to non-jury proceedings.

[12]*See* note 3, *supra.*

## IV. Consent As A Precondition Or Limitation On Coverage[13]

| Entity | States With Consent Of Entity As Absolute Precondition (Total) | States With Consent Of Entity As Limited Condition (Total) | States Where Consent of Entity Not Required (Total) |
|---|---|---|---|
| A. *Court's Consent*[14] (all cases) | Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Iowa, Kentucky,[15] Louisiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, West Virginia, Wisconsin (28) | None (0) | None (0) |

| | | | | |
|---|---|---|---|---|
| B. | *Party's Consent*[16] (civil cases and criminal appeals) | Alabama, Georgia,[17] Louisiana, Tennessee (4) | Alaska, Oklahoma, Pennsylvania,[18] Washington (4)[19] | Arizona, California, Colorado, Florida, Idaho, Iowa,[20] Kentucky,[21] Massachusetts, Minnesota, *(continued)* |

[13]In this classification the term "absolute precondition" means that the particular entity's consent or acquiescense must be obtained for any coverage to occur. "Limited condition", unless otherwise stated, means that, if consent is not obtained or objection is made, that particular entity (*e.g.*, jurors) may not be covered but the remainder of the proceeding may be. In States where consent is not required or a limited condition is not imposed, coverage of the proceeding or the entity is not contingent upon consent.

[14]Twenty-eight States (all States allowing trial and/or appellate coverage) fall within this description.

[15]*See* note 1, *supra*.

[16]Twenty-eight States (all States allowing trial and/or appellate coverage) fall within this description.

[17]Although the general Georgia coverage provisions do not explicitly require the parties' consents, all plans approved by the Georgia Supreme Court contain such a requirement.

[18]Pennsylvania does not permit appellate court coverage.

[19]It is not entirely clear what would occur in Alaska, Oklahoma, and Washington if a criminal defendant objects to coverage of his appeal. Taken literally, the rules of those States would seem to permit coverage of the proceedings but preclude coverage of the defendant in those circumstances. Since many defendants do not attend their appeal proceedings, the point may be a relatively minor one.

[20]In Iowa, consents of parties are not required except in "juvenile, dissolution, adoption, child custody, or trade secrets cases."

[21]*See* note 1, *supra*.

| Entity | States With Consent Of Entity As Absolute Precondition (Total) | States With Consent Of Entity As Limited Condition (Total) | States Where Consent of Entity Not Required (Total) |
|---|---|---|---|
| B. *Party's Consent (continued)* | | | Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York,[22] North Dakota, Ohio, Texas, West Virginia, Wisconsin (20) |
| C. *Counsel's Consent*[23] | Alabama, Alaska, Georgia, Louisiana, Tennessee (5) | None (0) | Arizona, California, Colorado, Florida, Idaho, Iowa, Kentucky,[24] Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York,[25] North Dakota, Ohio, Oklahoma, Pennsylvania, |

| | | | |
|---|---|---|---|
| | | | Texas, Washington, West Virginia, Wisconsin (23) |
| D. *Witness's Consent*[26] (civil and criminal trials) | None (0) | Alabama, Alaska, Colorado,[27] Georgia, New Mexico,[28] Oklahoma, Pennsylvania, Tennessee, Washington (9) | California, Florida, Iowa, Kentucky,[29] Louisiana, Massachusetts, Montana Nevada, New Hampshire, New Jersey, Ohio, West Virginia, Wisconsin (13) |



[22]*See* note 3, *supra*.

[23]Twenty-eight States (all States allowing trial and/or appellate coverage) fall within this description. As used here, the term "Counsel" excludes only prosecutors in criminal trials. Prosecutors are covered in a separate category, *infra*.

[24]*See* note 1, *supra*.

[25]*See* note 3, *supra*.

[26]This entity description encompasses 22 States — those allowing trial and appeals coverage (19 States) and those allowing trial coverage only (3 States).

[27]In Colorado, consents of witnesses are not required except that a judge shall prohibit coverage of objecting witnesses and jurors in attendance under court order or subpoena.

[28]In New Mexico, consents of witnesses are not required except that a judge shall prohibit coverage of objecting witnesses and jurors who are in attendance under court order or subpoena.

[29]*See* note 1, *supra*.

| Entity | States With Consent Of Entity As Absolute Precondition (Total) | States With Consent Of Entity As Limited Condition (Total) | States Where Consent of Entity Not Required (Total) |
|---|---|---|---|
| E. *Juror's Consent*[30] (civil and criminal trials) | None (0) | Alabama, Alaska, Colorado,[31] New Mexico,[32] Oklahoma, Tennessee, Washington (7) | California, Florida, Georgia, Iowa, Kentucky,[33] Louisiana, Massachusetts, Montana, Nevada, New Hampshire,[34] New Jersey,[35] Ohio, West Virginia, Wisconsin (14) |
| F. *Defendant's Consent*[36] (criminal trials) | Alabama, California, Colorado, Georgia,[37] Louisiana, New Mexico, Oklahoma, Tennessee (8) | Alaska,[38] Washington (2) | Florida, Iowa, Kentucky,[39] Massachusetts, Montana, Nevada, New Hampshire, New Jersey, Ohio, West Virginia, Wisconsin (11) |
| G. *Prosecutor's Consent*[40] | Alabama, Alaska, California, | None (0) | Colorado, Florida Iowa, Kentucky,[42] |

| | | |
|---|---|---|
| (criminal trials) | Georgia,[41] Louisiana, Tennessee (6) | Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Washington, West Virginia, Wisconsin (15) |

[30]This entity description embraces 21 States — those allowing trial and appeals coverage (19 States) and those allowing trial coverage in jury cases (2 States). Pennsylvania does not permit coverage of jury proceedings.

[31]*See* note 27, *supra.*

[32]*See* note 28, *supra.*

[33]*See* note 1, *supra.*

[34]In New Hampshire in criminal cases, prior express approval of the Presiding Justice of the Superior Court is needed for jury coverage.

[35]Coverage of jurors in New Jersey is permissible but it may not be such as to allow actual visual recognition of jurors.

[36]This description includes 21 States — those allowing trials and appeals coverage (19 States) and those allowing trial coverage of criminal cases (2 States). Pennsylvania does not allow coverage of criminal trial proceedings.

[37]Although the general Georgia coverage provisions do not explicitly require the criminal defendant's consent, all plans approved by the Georgia Supreme Court contain a provision mandating the parties' consents.

[38]It should be noted, however, that, in Alaska, counsel's consent is an absolute precondition to coverage in all cases. *See* Appendix A.

[39]*See* note 1, *supra.*

[40]This entity description includes 21 States. *See* note 36, *supra.*

[41]Although the general Georgia coverage provisions do not explicitly require the prosecutor's consent, all plans approved by the Georgia Supreme Court contain a provision requiring counsel's consent.

[42]*See* note 1, *supra.*

## V. Coverage Exemptions For Certain Specified Types Of Cases

The rules of a number of States (*e.g.*, Nevada and Oklahoma) make clear the fact that coverage is not permitted when access is otherwise restricted by law. Moreover, although the courts in all States which permit coverage retain the authority to preclude coverage on a case-by-case basis, a number of States have explicitly prohibited or limited coverage in particular types of cases. In this category, those particular types of cases are enumerated.

| Type of Case | States (Total) |
|---|---|
| A. Adoption | Iowa,[43] Kentucky[44] (2) |
| B. Child Custody | Iowa,[43] Kentucky,[44] New Jersey,[45] Pennsylvania,[46] Wisconsin[47] (5) |
| C. Divorce | Iowa,[43] Kentucky,[44] New Jersey,[45] Pennsylvania,[46] Wisconsin[47] (5) |

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[43]In these types of cases, Iowa permits coverage if consents of the parties are obtained. In all other cases, Iowa requires no consents of the parties.

[44]*See* note 1, *supra*. Specifically, the Jefferson Circuit Court (30th Judicial Circuit) reserved the right to restrict access "in sensitive trial situations involving children and in any matters of domestic relations."

[45]New Jersey absolutely precludes coverage of these proceedings and uses the broad term "matrimonial disputes."

[46]Pennsylvania specifically excludes these cases from the scope of non-jury civil proceedings which may be covered.

[47]Wisconsin requires that objections of participants to coverage in these cases shall be presumed to have validity. Wisconsin's rule extends to the victims of crimes, including sexual crimes.

| Type of Case | States (Total) |
|---|---|
| D. Juvenile Proceedings | Iowa,[48] Kentucky,[49] New Jersey,[50] New Mexico,[51] Wisconsin[52] (5) |
| E. Motions to Suppress Evidence | Wisconsin[52] (1) |
| F. Police Informants | New Mexico,[51] Wisconsin[52] (2) |
| G. Relocated Witnesses | New Mexico,[51] Wisconsin[52] (2) |
| H. Sex Crimes | New Jersey (rape only),[50] New Mexico,[51] Wisconsin[52] (3) |
| I. Trade Secrets | Iowa,[48] New Jersey,[50] Wisconsin[52] (3) |
| J. Undercover Agents | New Mexico,[51] Wisconsin[52] (2) |

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[48]In these types of cases, Iowa permits coverage if consents of the parties are obtained. In all other cases, Iowa requires no consents of the parties.

[49]*See* note 1, *supra*. Specifically, the Jefferson Circuit Court (30th Judicial Circuit) reserved the right to restrict access "in sensitive trial situations involving children and in any matters of domestic relations."

[50]New Jersey absolutely precludes coverage of these proceedings.

[51]New Mexico forbids photographic coverage of these individuals. In the context of sexual crimes, this includes victims and their families.

[52]Wisconsin requires that objections of participants to coverage in these cases shall be presumed to have validity. Wisconsin's rule extends to the victimes of crimes, including sexual crimes.